No. 370

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In the Supreme Court of the United States

OCTOBER TERM, 1955.

KANSAS CITY POWER & LIGHT COMPANY, a Missouri corporation, ST. JOSEPH LIGHT & POWER COMPANY, a Missouri corporation, MISSOURI POWER & LIGHT COMPANY, a Missouri corporation, MISSOURI PUBLIC SERVICE COMPANY, a Missouri corporation, UNION ELECTRIC COMPANY OF MISSOURI, a Missouri corporation, MISSOURI UTILITIES COMPANY, a Missouri corporation, ARKANSAS-MISSOURI POWER COMPANY, an Arkansas corporation, THE EMPIRE DISTRICT ELECTRIC COMPANY, a Kansas corporation,

Petitioners,

vs.

DOUGLAS McKAY, Secretary of the Interior, DOUGLAS G. WRIGHT, Administrator of the Southwestern Power Administration, EZRA TAFT BENSON, Secretary of Agriculture, ANCHER NELSEN, Administrator of the Rural Electrification Administration, and GEORGE M. HUMPHREY, Secretary of the Treasury,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the District of Columbia Circuit.

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(Continued on inside cover.)

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TABLE OF CONTENTS.

OPINIONS BELOW ---- 1

JURISDICTION ---- 2

QUESTIONS PRESENTED ---- 2

STATUTES INVOLVED ---- 6

STATEMENT OF THE CASE ---- 6

1. Proceedings in the Courts Below ---- 7

2. Gist of Separate Claims Alleged in the Complaint as Amended ---- 8

3. Salient Facts Established by the Findings and Evidence ---- 12

REASONS FOR GRANTING THE WRIT ---- 17

A. Construction of the APA and Petitioners' Rights to be Heard Thereunder ---- 18

B. Conspiracy ---- 23

C. Construction of the RE and Flood Control Acts and Petitioners' Rights to be Heard Thereunder ---- 25

D. Petitioners' Rights to be Heard in Protection of Their Non-exclusive Franchises ---- 29

E. Respondents' Other Objection to Judicial Examination of Their Actions Which Were Not Considered by the Court Below ---- 30

F. Great Public Importance of Prompt Settlement of Questions Presented ---- 31

CONCLUSION ---- 33

APPENDIX A: Statutes Involved ---- 34

APPENDIX B:

Opinion of the United States Court of Appeals for the District of Columbia Circuit ---- 42

Judgment of the United States Court of Appeals for the District of Columbia Circuit ---------- 66

APPENDIX C:

Excerpts from Statement of Clarence A. Davis, Solicitor of the Department of the Interior, Before the Subcommittee of the Senate Committee on the Judiciary, January 21, 1954 ---- 67

Excerpts from Opinion No. 4506, Dated November 24, 1942, by Robert H. Shields, Solicitor of the Department of Agriculture ---------- 69

Excerpts from Opinion No. 5427, Dated November 3, 1948 by W. Carroll Hunter, Solicitor of the Department of Agriculture ---------- 70

TABLE OF AUTHORITIES.

Cases.

Alabama Power Co. v. Ickes, 91 F. 2d 303 ---------- 25

Alabama Power Co. v. Ickes, 302 U. S. 464 ---------- 8, 23, 24, 29, 30

American Power Co. v. S. E. C., 325 U. S. 385 (1945) 20

American President Lines v. Fed. Maritime Bd. (D. C.), 112 F. Supp. 346 ---------- 23

Apfel v. Mellon, 59 App. D. C. 94, 33 F. 2d 805, cer. den. 280 U. S. 585 ---------- 20

Ashwander v. TVA, 297 U. S. 288 ---------- 32

Associated Industries v. Ickes (C. C. A. 2), 134 F. 2d 694 (1943), rev. on other grounds, 320 U. S. 707 20

A. T. & S. F. R. Co. v. Reesman (C. C. A. 8), 60 Fed. 370 ---------- 28

Bell v. Hood, 327 U. S. 678 ---------- 17

Campbell v. Arkansas-Missouri Power Co. (C. C. A. 8), 55 F. 2d 560 ---------- 30

Central Ill. Pub. Serv. Co. v. Bushnell (C. C. A. 7), 109 F. 2d 26 ---------- 30

Chapman v. Federal Power Comm., 345 U. S. 153 ---22, 28

Cherokee Nation v. Hitchcock, 187 U. S. 294 ---------- 31

Corp. Comm. v. Lowe, 281 U. S. 431 ---------- 29

Davis v. Las Ovas Co., 227 U. S. 80 ---------- 31

Fairport R. Co. v. Meredith, 292 U. S. 589 ---------- 28

FCC v. Sanders Radio Station, 309 U. S. 470 (1940) 20

Frost v. Corp. Comm., 278 U. S. 515 ---------- 29

Gallardo v. Porto Rico Ry. L. & P. Co. (C. C. A. 1), 18 F. 2d 918 ---------- 30

Georgia v. Penn. R. Co., 324 U. S. 439 ---------- 31

Heikkila v. Barber, 345 U. S. 229 ---------- 22

Hickman v. Taylor, 329 U. S. 495 ---------- 32

Kansas Gas & El. Co. v. Independence (C. C. A. 10), 79 F. 2d 32 ---------- 30

Land v. Dollar, 330 U. S. 731 ----------17, 31

Lane v. Watts, 234 U. S. 525 ---------- 31

Larson v. Domestic & Foreign Corp., 337 U. S. 682 --- 31

Marks v. United States, 161 U. S. 297 ---------- 20

National Licorice Co. v. N. L. R. B., 309 U. S. 350 ---- 31

Oklahoma v. Civil Service Comm., 330 U. S. 127 ---- 29

Philadelphia Co. v. Stimson, 223 U. S. 605 ---------- 31

Reade v. Ewing (C. A. 2), 205 F. 2d 630 ---------- 23

Scripps-Howard Radio v. FCC, 316 U. S. 4 (1942) --- 20

Shaughnessy v. Pedreiro, 349 U. S. 48 ---------- 23

Shields v. Barrow, 17 How. 130 ---------- 31
Stark v. Wickard, 321 U. S. 288 ---------- 29
TEP Co. v. TVA, 21 F. Supp. 947 ---------- 25
TEP Co. v. TVA, 306 U. S. 118 ----------8, 25, 29, 30
Unger v. United States (E. D. Ill.), 79 F. Supp. 281 -- 23
United States v. Lee, 106 U. S. 196 ----------17, 31
United States v. Louisiana, 339 U. S. 699 ---------- 31
United States v. San Francisco, 310 U. S. 16 -------- 32
Wong Yang Sung v. McGrath, 339 U. S. 33 --------- 23

Statutes.

Administrative Procedure Act (5 U. S. C. 1001-11) -- 2
Section 10 (5 U. S. C. 1009) ----------2, 6, 18, 19, 37
Continuing Fund Act (16 U. S. C. 825s-1) -----2, 5, 6, 39
District of Columbia Code, Part II, Secs. 11-305, 11-306 7
Flood Control Act of 1944, as amended, Section 5 (16 U. S. C. 825s) ----------2, 3, 5, 6, 25, 26, 36
Interior Department Appropriation Act, 1953 (66 Stat. 446) ----------5, 6, 40
Rural Electrification Act of 1936, as amended (7 U. S. C. 901-14) ----------2, 3, 25, 26
Section 4 ----------4, 6, 34
Section 13 ----------4, 6, 35
28 U. S. C. 1254(1) ---------- 2
28 U. S. C. 1331, 1332 ---------- 7

Regulations and Congressional Reports.

80 Cong. Rec., 5283 ---------- 27
8 Fed. Reg. 12142 ---------- 3
10 Fed. Reg. 14527 ---------- 3
H. Rept. No. 1628, 82d Cong., 2d Sess. (1952) ---------- 29
H. Rept. No. 2451, 82d Cong., 2d Sess. (1952) ---------- 29
Sen. Doc. No. 248, 79th Cong., 2d Sess. ----------
----------19, 20, 21, 22, 23, 28
Sen. Rept. No. 1030, 78th Cong., 2d Sess. ---------- 27
Sen. Rept. No. 1803, 82d Cong., 2d Sess. (1952) ---------- 29

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Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the District of Columbia Circuit.

The Petitioners severally pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on April 28, 1955.

OPINIONS BELOW.

The separate memoranda of two judges of the district court denying Respondents' successive motions to dismiss the complaint and for summary judgments are unreported and are severally printed in the record. (R. 105-7; 109-10.)* The opinion of the district court on the

* Nine additional copies of the portions of the record, which were printed in a Joint Appendix for the use of the court below and are included in the record certified to this Court, are filed herewith.

separate trial is printed in the record (R. 126-50) and is reported in 115 F. Supp. 402. The majority and dissenting opinions in the court of appeals (R. 653) are unreported and are printed in Appendix B hereto, *infra*, 42, 58.

JURISDICTION.

The judgment of the court of appeals was entered on April 28, 1955 (R. 679, App. B, *infra*, 66). Rehearing was denied on June 3, 1955 (R. 711). The jurisdiction of this Court is invoked under 28 *U. S. C.* Sec. 1254(1).

QUESTIONS PRESENTED.

The court below (Circuit Judge Prettyman dissenting) decided that none of Petitioners has a right to be heard and consequently did not decide the other procedural and evidentiary questions or the substantive questions presented to that court on the appeal. (App. B. 42.) The questions directly presented by the foregoing decision are:

A. Whether each or any of Petitioners has a right to be heard

1. "as a person suffering legal wrong" or "as a person adversely affected" or "as a person aggrieved" within the meaning of § 10 of the Administrative Procedure Act (5 U. S. C. § 1009);* *or*

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* The following abbreviations are used in this petition:

Rural Electrification Act of 1936 as amended (7 U. S. C. 901-14)	— RE Act
Section 5 of the Flood Control Act of 1944 as amended (16 U. S. C. 825s)	— Flood Control Act
16 U. S. C. 825s-1	— Continuing Fund Act
Administrative Procedure Act (5 U. S. C. 1001-11)	— APA
Rural Electrification Administration	— REA
Southwestern Power Administration	— SPA

(Continued on following page)

2. to enjoin the carrying out of a conspiracy among Respondents, the Super Co-ops* and others, the necessary, intended and expressly required effect of which is to destroy the business of each Petitioner in large areas of its service territory and, for a term of forty years, to foreclose each Petitioner from competing on any terms in such areas; *or*

3. to prevent destruction of its legal rights or interests created by the RE and Flood Control Acts proximately caused by Respondents' actual and threatened violations of statutory restrictions upon the authority of their respective administrators which were imposed by Congress for the protection of privately owned utilities; *or*

4. to prevent destruction of its property rights in non-exclusive franchises imminently threatened by Respondents acting pursuant to said conspiracy as private individuals and not in their official capacities.

The following questions, although deemed without substance, are presented because they were raised by Respondents in, but not decided by, the court below.

(Continued from preceding page)

SPA is an administrative subdivision of the Department of the Interior which was set up by administrative order on September 1, 1943, to perform certain wartime functions assigned to the Secretary of the Interior by Executive Order. 8 Fed. Reg. 12142. By an administrative order dated November 8, 1945, the Secretary of the Interior designated SPA as his "marketing agent" for surplus hydroelectric power produced at federal multiple reservoir projects located in a specified area and delivered to him for disposal by the Secretary of the Army under the Flood Control Act. 10 Fed. Reg. 14527. (R. 30.)

All emphasis in this Petition is supplied.

* The terms "Super Co-op" or "federated cooperative," as used in this case, mean a non-profit membership corporation organized under State law to generate, transmit and sell electric energy at wholesale to its members. Its members are generally rural electric distribution cooperatives which supply their consumer-members over their own distribution systems with electricity purchased at wholesale and delivered by their suppliers at their principal load centers. (R. 35; App. B 43, 59.)

B. Whether the instant case is an action against the United States.

C. Whether the Super Co-ops are indispensable parties.

Important questions of statutory construction and an important question of federal constitutional authority, which were decided by the district court and presented to, but not decided by, the court below, can be settled only by this Court. Their mere statement shows their magnitude and the great importance of their prompt settlement. (*Infra*, 31-2.) For that reason Petitioners also present, and urge this Court to decide, the following questions:

D. Whether §§ 4 and 13 of the RE Act authorize or permit its Administrator to make loans:

1. to finance the construction of generating and transmission facilities to serve persons in rural areas in substitution for Petitioners' generating and transmission facilities by which such persons are being, and at all times have been, furnished with central station electric service; *or*

2. to finance the construction of generating and transmission facilities which would be used continuously for 40 years to serve numerous municipalities each of which has a population in excess of 1500 inhabitants; *or*

3. to SPA or to finance the construction of generating and transmission facilities for the use and benefit of SPA; *or*

4. which are principally secured by payments of federal funds to be made by SPA under contracts with the Super Co-ops that have been assigned and pledged to REA as security therefor.

E. Whether, under four of the five systems of contracts involved in this case, SPA is the real borrower of

the REA funds and would be the beneficial owner of the generating and transmission facilities to be constructed and, if so, whether SPA has any authority, under the Flood Control Act (1) to borrow, (2) to acquire the beneficial ownership of the facilities, or (3) to acquire 40-year leasehold estates in the transmission facilities in the absence of specific congressional appropriations therefor.

F. Whether the Flood Control Act, the Continuing Fund Act or the Interior Department Appropriations Act, 1953 (66 *Stat.* 446) authorizes SPA (1) to sell any power and energy other than that delivered to SPA by the Secretary of the Army or received in exchange for power and energy so delivered to SPA *or* (2) to acquire beneficial ownership or permanent use of thermal electric generating stations to generate electricity for commercial sale to the public or for any purpose *or* (3) to purchase thermal electric power and energy for commercial resale to the public, *or* (4) to purchase power and energy for the purpose, or with the result, of increasing the quantity of electric power and energy, which SPA would have for commercial sale and would sell to the public, to a quantity greatly in excess of the amount which the Secretary of the Army, under the Flood Control Act, would deliver to SPA for disposal.

G. Whether, if the foregoing statutes be construed as authorizing SPA to do any or all of the things specified in clauses (2), (3) or (4) of Question F, such statutes are to that extent severally in excess of federal constitutional authority.

If this Court reviews Questions D, E, F and G, Petitioners will demonstrate that each of them was erroneously decided by the district court but can not deal with them within the permissible limits of this petition. The following procedural questions, which were presented in but not decided by the court below, are also presented without dis-

cussion to preserve them in the event they should become material on determination of questions D, E, F and G.

H. Whether the district court committed prejudicial and reversible error in admitting over Petitioners' objections, and basing findings upon, testimony and evidence (1) based upon assumptions that facts, as to which that court had denied discovery and excluded proof, were contrary to Petitioners' allegations and contentions and (2) as to alleged administrative interpretations of the statutes involved.

I. Whether the district court erred prejudicially in denying Petitioners' motion to amend and supplement the findings of fact made and filed in the separate trial.

STATUTES INVOLVED.

The statutes involved are: (1) §§ 4 and 13 of the Rural Electrification Act of 1936, as amended, 7 *U. S. C.* 904, 913; (2) § 5 of the Flood Control Act of 1944, as amended, 16 *U. S. C.* 825s; (3) § 10 of the Administrative Procedure Act, 5 *U. S. C.* 1009; (4) the so-called Continuing Fund Act, as amended, 16 *U. S. C.* 825s-1 and (5) Interior Department Appropriation Act, 1953, 66 *Stat.* 446. They are printed in Appendix A, *infra*, 34.

STATEMENT OF THE CASE.

On October 3, 1950, Plaintiffs-Petitioners permissively joined with each other and two other corporations*

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* In January 1952, one of original plaintiffs, Missouri Gas & Electric Service Company, was merged into Petitioner Missouri Public Service Company. Missouri Edison Company, one of original plaintiffs, did not appeal from the judgment dismissing its separate claim for lack of jurisdictional amount. (R. 2-3, 113-4, 194.) The terms "defendants" and "Respondents" as herein used do not include the Secretary of the Treasury, who was joined as a proper, but not a necessary, party. (R. 6.)

in commencing this action against Respondent Wright and the predecessors in office of the other Respondents, each of whom has been duly substituted as a defendant. This case arises under federal law. There was and is diversity of citizenship between plaintiffs and defendants. Jurisdiction of the District Court was invoked under 28 *U. S. C.* 1331, 1332 and under Part II of the District of Columbia Code, §§ 11-305, 11-306. (R. 4-7, 151-2.)

1. Proceedings in the Courts Below: The gist of the separate claims alleged in the Complaint is that Respondents, the Super Co-ops and persons unknown to plaintiffs have entered into, and are threatening to carry out, a conspiracy to destroy the established electric utility business of each Petitioner in large areas of its service territory. Among the means being utilized to implement the conspiracy is the execution of systems of 40-year contracts in the making of which Respondents are usurping authority allegedly granted, but in fact denied, to them by the RE and Flood Control Acts. (*Infra*, 8-12.) In the district court different judges denied successive motions to dismiss the Complaint and for summary judgment upon the grounds, among others, that plaintiffs have no standing to be heard, that the case is an action against the Government and that the Super Co-ops are indispensable parties. (R. 104, 108, 111.) Over plaintiffs' objections, the district court ordered a separate trial upon an issue designated as "the legality or illegality of said contracts." (R. 112.) After the separate trial, the district court entered an interlocutory decree adjudging the contracts to be valid and authorized by law. (R. 191.) After making supplemental findings and conclusions as to jurisdictional amount, the district court entered a final judgment dismissing upon the merits the separate claim of each Plaintiff-Petitioner (R. 192); and Petitioners appealed.

Upon the supposed authority and applicability of *Alabama Power Co. v. Ickes*, 302 U. S. 464 and *TEP Co. v. TVA*, 306 U. S. 118, the court below, Prettyman *J.* dissenting, held "that Appellees' motion to dismiss should have been granted" upon the ground that Petitioners severally have no right to be heard upon their separate claims and entered judgment vacating the judgment of the district court with directions to dismiss the Complaint. (R. 679; App. B, *infra*, 66.) The court below stayed its mandate through September 1, 1955. (R. 713, 714.) The decision is based wholly upon the allegations of the Complaint and does not consider the findings and evidence or pass upon any other question presented. Consequently, it is necessary to state separately the gist of the Complaint and salient facts established by the findings and evidence.

2. Gist of Separate Claims Alleged in the Complaint as Amended: Plaintiffs are privately-owned corporations which are severally engaged in supplying, at wholesale and retail, electric utility service to the public under non-exclusive state franchises. (R. 4-5; 23-4.) Each plaintiff has been, is now and in the future will be, ready, able and willing to supply central station electric service to all rural electric distribution cooperatives and their consumer members which are now, or hereafter may be, located in its service territory. (R. 26, 114, 153-4, 158-9.) None of defendants has any form of franchise to engage in the electric utility business in the service territory of any plaintiff. (R. 113.)

The defendants, certain Super Co-ops and divers persons unknown to plaintiffs have entered into a conspiracy to destroy the existing and established business of each plaintiff in a large area of its service territory.* Pursuant

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* Contrary to the majority opinion (App. B 45), Petitioners have never alleged or claimed an unqualified right to be

(Continued on following page)

to, and as part of the means being utilized to implement, the conspiracy, defendants, two Super Co-ops (N. W. Electric Power Co-operative, Inc. and Central Electric Power Cooperative, hereinafter called "N. W." and "Central"), Sho-Me Power Corporation (hereinafter called "Sho-Me"), and divers persons unknown to plaintiffs have entered, or are threatening to enter, into three specifically described systems of contracts. (R. 35-47, 52.) The distribution cooperatives (which are members of N. W., Central or Sho-Me), and their consumer members are, and at all times have been, receiving central station electric service furnished by plaintiffs. (R. 36, 41-2, 114.)

Each of the N. W. and Central systems of contracts* includes "loan," "lease-option" and "power" contracts which are reciprocally contingent and conditioned upon each other and upon each Super Co-op obtaining a "requirements" contract from each of its member distribution cooperatives. (R. 38, 40, 44, 46.)

Under the "loan" contract (in form between REA and the Super Co-op), REA agrees to advance the entire cost of constructing generating and transmission facilities**

(Continued from preceding page)

free from federal competition as such. The gist of the claims alleged in the Complaint is not the setting up of competition but the conspiracy unlawfully to destroy Petitioners' established businesses—a result which is not fortuitous but expressly required by the terms of the systems of contracts executed (under color but in violation of the RE and Flood Control Acts) as one means of carrying out the conspiracy. (*Supra*, 7, App. B 64.)

* The allegations as to the Sho-Me system of contracts are substantially identical except that it is alleged to provide only for construction of transmission facilities. (R. 43, 44-5.)

** As alleged in the Complaint, the N. W., Central and Sho-Me loan contracts provide for the construction of two steam plants and of 1616 miles of transmission lines for the use of SPA at an aggregate estimated cost of $32,820,370.00. (R. 37-8, 43.)

upon 2% loans to be amortized during a 35-year term upon the conditions, among others, that no funds shall be advanced to the Super Co-op unless and until the "lease option," "power" and "requirements" contracts shall have been executed upon terms and in a form approved by REA and the "lease option" and "power" contracts shall have been assigned and pledged to REA to secure the loans. (R. 37, 38, 39, 43, 44, 45, 51.)

Under the "lease option" contract between each Super Co-op and SPA, the Super Co-op (1) agrees to construct the transmission facilities, when and if their cost is advanced by REA, in accordance with specifications approved by SPA and at a location selected by SPA as desirable for taking the existing business of each plaintiff, (2) in form "leases" such transmission facilities to SPA for 40 years at an "annual rental" measured by the amount necessary to amortize the principal and interest of the REA loan during its 35-year term, plus any expenses falling on the Super Co-op as "lessor" and (3) grants to SPA an option to purchase and take title to the transmission facilities (a) at any time for the currently unpaid balance of the loan, (b) without any payment during the portion of the "lease" term remaining after payment of the 35-year REA loan and (c) for $10.00 at the end of the 40-year term. (R. 38-9, 44-5.)

Under the "power" contract between each Super Co-op and SPA, the Super Co-op (1) agrees to purchase from SPA for 40 years the entire requirements of its member distribution cooperatives and (2) agrees (a) to construct a steam generating plant when and if funds are advanced by REA and (b) to sell its entire output to SPA for 40 years at a price measured by the amount necessary (i) to repay the REA construction loan and (ii) to cover all costs of operation, maintenance and capital replacement plus

all other expenses incident to ownership of the plant. (R. 39-40, 45.)

The "requirements" contract, which each Super Co-op must obtain from each of its member distribution cooperatives, binds each member cooperative (1) to cease purchasing electricity from plaintiffs and (2) for a period of 40 years, to purchase its entire electric requirements in form from the Super Co-op but in fact from SPA. (R. 40, 46.)

SPA will operate, maintain and wholly control the transmission facilities. (R. 39, 44.) SPA will control the times when, and the manner and extent to which, the steam plants will be operated; and in fact the steam plants will be operated by, for the benefit and under the exclusive control of, SPA. (R. 40, 46.) The transmission and generating facilities would be used exclusively by SPA for a 40-year period (equaling or exceeding their normal useful life) to serve SPA customers, including municipalities having a population in excess of 1500 inhabitants. (R. 39, 44, 47, 113.)

None of the proceeds of the loans can be used for the construction of distribution lines;* and construction of the proposed generating and transmission facilities in substitution for the existing facilities of plaintiffs would not bring or make available central station electric service to a single additional rural inhabitant. (R. 38, 43-4.)

Pursuant to, and in further implementation of, said conspiracy, defendants and other Super Co-ops (located in plaintiffs' service territories) are threatening to enter into

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* Consumers can be served only from distribution lines of relatively low voltage and small capacity. Transmission lines (having large capacity) transport power and energy at relatively high voltage to substations located at convenient distribution points known as "load centers" where the voltage is reduced before delivery into distribution lines or systems. (R. 286, 291, 292, 293.)

other substantially identical systems of contracts. (R. 48.)

An actual and intended effect of carrying out the conspiracy will be (1) unlawfully to loan REA funds to SPA and (2) unlawfully to enable SPA (a) to construct or acquire, with REA funds, thousands of miles of transmission lines with appurtenant facilities and large thermal-electric generating capacity; (b) to increase the quantity of electric power and energy, which SPA would sell commercially to the public, to an amount greatly in excess of that delivered to SPA by the Secretary of the Army; and (c) unlawfully to extend SPA's electric utility system and operations into the service territories of plaintiffs. (R. 47, 27-8, 29-30, 50.)

A necessary, intended and specifically required result of carrying out the conspiracy will be to destroy the existing and established business of each plaintiff in large areas of its service territory, to exclude each plaintiff for 40 years from competing upon any terms in such areas and to destroy the value of facilities which have been provided by plaintiffs, and are useful, exclusively for supplying central station electric service to the consumer members of the rural distribution cooperatives which are members of one of the Super Co-ops. (R. 40, 46, 47, 52, 114.)

Each of the acts, which (in furtherance of the conspiracy) defendants are doing and threatening to do under the pretended authority of the RE and Flood Control Acts, is not authorized by either, but instead is forbidden by one or both, of those Acts. (R. 27-8, 29-30, 50.)

3. Salient Facts Established By the Findings and Evidence: The findings and evidence fully establish the controlling facts specifically alleged in the Complaint and other legally significant facts which support Petitioners' claims. Pursuant to the conspiracy, Respondents and five Super Co-ops have executed five systems of contracts to each of which either N. W., Central, Sho-

Me, KAMO Electric Cooperative, Inc. (hereinafter called KAMO) or M. & A. Electric Cooperative (hereinafter called M. & A.) is a party. (R. 159-62, 183-4.) All of the distribution cooperatives (which are members of one of the foregoing Super Co-ops) and their consumer members are, and at all prior times have been, receiving central station electric service furnished wholly or principally by Petitioners. (R. 155-8, 224-5, 370-1, 279.)

Each of the N. W., Central, Sho-Me and KAMO systems* of contracts includes three basic contracts (denominated a "loan contract," a "lease option contract" and a "power contract") which are reciprocally conditioned upon each other and upon each Super Co-op's obtaining a "requirements contract" from each of its member distribution cooperatives. Each system of contracts provides for the construction of transmission lines and appurtenant substations; and each of the N. W. and Central systems also provides for construction of a steam plant. None of the systems of contracts provide for the construction of distribution lines. (R. 159-62, 165, 166-7, 168-9.)

Each loan contract provides: REA will advance the entire cost of the facilities on 2% loans to be amortized during a 35-year term. No funds shall be advanced for their construction unless and until, among other things, the "lease-option," "power" and "requirements" contracts shall have been executed and approved by REA and the "lease-option" and "power" contracts between the Super Co-op and SPA shall have been assigned and pledged to REA as security for the loan. The Super Co-op "shall forthwith pay to" REA "all sums received by" the Super Co-op from SPA under the "lease option" and "power"

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* For present purposes it is deemed unnecessary to describe the M & A system of contracts, which involves some but not all of the questions presented by the other four systems.

contracts "on account of the principal of and interest on the notes" evidencing the loan. (R. 165-6.)

Each "lease-option" contract provides: The Super Co-op agrees to construct the transmission facilities "out of funds advanced by REA" on a route, upon plans and specifications and with materials and workmanship approved by SPA and in form to "lease" the transmission facilities for 40 years to SPA, which will operate, maintain, repair, provide capital replacements in, and exercise exclusive control over, such transmission facilities. (R. 161, 169-170, 171-2.) During the 35-year term of the loan, the monthly "rental" to be paid by SPA is measured by the amount necessary to amortize the principal and interest of the REA loan and to cover all costs which will fall on the Super Co-op as "lessor" or holder of record title and, after repayment of the loan, by the amount necessary to cover the continuing costs so falling on the Super Co-op. (R. 170, 171-2.) Each "lease" grants to SPA an option to purchase and to take unencumbered title to the transmission facilities (1) at any time upon payment of the then unpaid balance of the REA loan, (2) without making any payment during the five years of the "lease" term remaining after payment of the REA loan and (3) for $10.00 at the end of the "lease" term. (R. 170, 171-2.)

Each "power" contract provides: For 40 years the Super Co-op agrees to purchase the entire requirements of its members from SPA. SPA's obligation to sell and deliver any power and energy is conditioned upon the transmission lines being constructed, delivered to, and accepted by SPA. Under the N. W. and Central "power" contracts each Super Co-op also agrees to construct a steam plant "out of funds to be advanced by REA" and, for a period of 40 years, to sell the entire output to SPA which will have complete control over the times when, and the extent to

which, the steam plant shall be operated. (R. 161-2, 173, 175-6, 177-8.) Without regard to how much, if any, power and energy shall be produced by each steam plant, SPA agrees to make monthly payments which are to be sufficient to cover (1) all principal and interest payments on the REA construction loan, (2) all costs of operating and maintaining, and of making capital replacements in, each plant during the 40-year term and (3) all other costs which would fall on each Super Co-op in connection with each steam plant. (R. 174, 176.)

If SPA was the record borrower of the REA funds for construction of the transmission and generating facilities and was to be the holder of record title to such facilities, SPA would have no additional or other payments, costs, or expenses to make, assume, meet or pay. (R. 170, 171-2, 174, 176.) The 40-year terms of the "lease option" contracts and of the N. W. and Central "power" contracts equal or exceed the normal useful life of such transmission and generating facilities. (R. 175, 226, 264-5, 279-82, 605-6.)

SPA has contracted to sell and deliver power and energy to thirteen Missouri municipalities as soon as such generating and transmission facilities are constructed and made available to SPA and has officially reported that it will be able to serve twenty-four other municipalities over transmission facilities to be constructed and leased to, or used by, SPA under the five systems of contracts. Each of such municipalities has a population in excess of 1500 inhabitants. Such transmission and generating facilities are essential to enable SPA to carry out its contracts to serve such municipalities. (R. 162-3.)

The payments to be made by SPA under the "lease option" and "power" contracts, which have been assigned and pledged to secure the N. W., Central, Sho-Me and

KAMO loans, constitute the principal security for repayment of those loans. (R. 183.)

Under the N. W., Central, Sho-Me and KAMO systems of contracts, REA will finance (at an estimated aggregate cost of $42,279,000.00) the entire cost of constructing, and for a period of 40 years, SPA will acquire the exclusive use of an integrated electric system consisting of (1) two 154,000 volt transmission lines and appurtenant substations aggregating 435 miles in length and extending from the federal Bull Shoals Project in Arkansas to Missouri City and Chamois, Missouri, respectively; (2) 1,509 miles of 69,000 volt transmission lines and appurtenant substations covering a large part of Missouri and extending into eastern Kansas; and (3) two steam plants with an aggregate capacity of 55,000 kilowatts. Those facilities will be integrated with and become an integral part of SPA's electric utility system which will be correspondingly enlarged.* (R. 159-62, 175, 177, 178-9.)

The entire capacity (1) of the foregoing transmission facilities and (2) of the foregoing steam plants will be used by, and will be essential to, SPA for a period of 40 years to supply and deliver power and energy to SPA customers. (R. 178.)

By purchasing the entire output of the N. W. and Central steam plants and part of the output of the M. & A. thermal generating station, SPA would increase the amount of power and energy, which it would have for commercial sale and would sell commercially to the public during the next 40 years, to an amount greatly in excess of the quantity of federally-owned power and energy

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* The location and extent of the integrated electric system which would be added to SPA's electric utility system, are shown on the map inserted before the back cover. (Reduced from Plfs. Ex. 2, R. 652.)

which would be delivered to SPA for disposal by the Secretary of the Army, and would sell commercially power and energy which would not have been so delivered, or received in exchange for power and energy so delivered, to SPA. (R. 161-2, 166, 173, 175, 178-9, 184.)

From the foregoing it is plain that the intended, necessary and inescapable result of carrying out the foregoing conspiracy would be to destroy the existing and established business of each Petitioner in a large area of its service territory, to prevent each Petitioner from competing in those areas on any terms for 40 years and to destroy the value of facilities provided and useful solely to serve Petitioners' customers and service areas which would be taken by SPA.

REASONS FOR GRANTING THE WRIT.

The Court below, Prettyman J. dissenting, holds that Petitioners have no right to be heard on any of the four independent grounds upon which they rely.* (App. B 42.) The effect of the decision is to hold that, even though the business of an American citizen is threatened with destruction by a conspiracy among federal officers and others or by federal officers usurping authority in excess of, and in violation of statutory restrictions upon, their statutory and constitutional authority, an American citizen has no right to be heard in our courts. The widespread and disastrous consequences of such a decision—to the public interest, to American citizens generally and to the continued existence of a constitutional government of law instead of men—cannot be overstated.

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* The allegations in the Complaint of illegal conduct by Respondents, being patently substantial, must be accepted for the purpose of determining Petitioners' right to be heard. *United States v. Lee*, 106 U. S. 196, 219; *Bell v. Hood*, 327 U. S. 678, 682-3, 685; *Land v. Dollar*, 330 U. S. 731, 738-9.

A. Construction of the APA and Petitioners' Rights to be Heard Thereunder: The decision of the court below, that none of Petitioners has a right to be heard under § 10 of the APA, erroneously construes the statute, and is, we submit, in conflict with applicable decisions of this Court and of other federal courts of appeals. If not, it decides questions of statutory construction, which are of the highest and most widespread importance in the daily administration of justice in the federal courts and which have not been, but should be, settled by this Court.

Specifically the court below holds (1) that the APA does not increase the availability of judicial review of agency action; (2) that persons "adversely affected or aggrieved" by agency action have no right to judicial review unless the statute, under which agency action is taken, grants such a right; (3) that one damaged only by competition is not "adversely affected"; (4) that a person claiming "legal wrong" has no right of judicial review except under judicial decisions rendered before the APA and, consequently, § 10 confers no right to judicial review upon persons suffering "legal wrong"; (5) that neither the RE Act nor the Flood Control Act is a relevant statute; (6) that absence of an express provision for judicial review in the RE and Flood Control Acts evidences a congressional intent to deny judicial review; and (7) that the instant case presents none of the evils which the APA was intended to remedy. (App. B, 50-7.)

After ten years of intensive consideration and study by the Congress, the APA was enacted into law on June 11, 1946. The evils, which the Congress conceived to be disclosed by its study and sought to remedy, include: administrative usurpation of powers not granted and arbitrary exercise of powers granted; the conversion of statutory grants of authority into "blank checks drawn to

the credit of some administrative officer or board"; and denial of judicial review in many prior judicial decisions in part or in whole upon the theory that absence of an express statutory provision for judicial review evidences a congressional intent to preclude such review. (Sen. Doc. No. 248, 79th Cong. 2d Sess. at 212, 217, 275, 281, 368.)*

Congress concluded that the foregoing evils stemmed primarily from the wide extent to which judicial review of agency action was not available under then existing judicial decisions and that an appropriate and indispensable remedy for those evils was greatly to increase the availability of judicial review of agency action. (Sen. Doc. 248 at 217, 281.) Consequently in the APA, Congress undertook to subject to judicial review every final agency action which is not committed to agency discretion or taken under a statute precluding judicial review. (§ 10(c); Sen. Doc. 248 at 368**.)

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* "Judicial review is of utmost importance, but it can be operative in relatively few cases because of the cost and general hazards of litigation. It is *indispensable since its mere existence* generally precludes the arbitrary exercise of powers or assumption of powers not granted." (Sen. Doc. 248 at 217, 281.)

"Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, *for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board.*" (Sen. Doc. 248 at 212, 275.)

"Legislative intent to forbid judicial review must be, if not specific and in terms, at least clear, convincing, and unmistakable under this bill. The mere fact that Congress has not expressly provided for judicial review would be completely immaterial—see *Stark v. Wickard* (321 U. S. 288 at p. 317)." (Sen. Doc. 248 at 368.)

** "It [APA] is a means of enforcing all forms of law and all types of legal limitations. Every form of statutory right or

(Continued on following page)

Before and during the period in which Congress was considering the appropriate remedy for the foregoing evils, the Congress, in several statutes creating administrative agencies, had expressly authorized any person adversely affected, or any person aggrieved, by their actions to invoke judicial review of the agency's actions as representatives of the public interest as well as to protect citizens against special damage caused by the usurpation of authority not granted. This Court had sustained such grants of authority and had held that one threatened with special damage by agency action (whether caused by competition or otherwise) was "adversely affected" within the meaning of such statutes. *FCC v. Sanders Radio Station*, 309 U. S. 470, 476-7 (1940); *Scripps-Howard Radio v. FCC*, 316 U. S. 4, 14 (1942); *American Power Co. v. S. E. C.*, 325 U. S. 385, 390 (1945); *Associated Industries v. Ickes* (C. C. A. 2), 134 F. 2d 694, 702-6 (1943), rev. on other grounds, 320 U. S. 707.

Thus, the terms "a person adversely affected" and "a person aggrieved" had established legislative and judicial meanings and were plainly so used by Congress in the APA. *Marks v. United States*, 161 U. S. 297, 302-3; *Apfel v. Mellon*, 59 App. D. C. 94, 33 F. 2d 805, 807, cer. den. 280 U. S. 585. The construction of those terms by the court below is in conflict with the foregoing decisions, deprives the statutory language of any meaning (*FCC v. Sanders Radio Station*, 309 U. S. 470, 477) and is clearly erroneous.

(Continued from preceding page)

limitation would thus be subject to judicial review under the bill. It would not be limited to constitutional rights or limitations alone—see *Perkins v. Lukens Steel Co.* 310 U. S. 113." (Sen. Doc. 248 at 368.)

The Senate Committee Report states:

> "This subsection [§ 10(a)] *confers* a right of review upon any person adversely affected *in fact* by agency action *or* aggrieved within the meaning of any statute. The phrase 'legal wrong' means such a wrong as is specified in subsection (e) of this section. It [i.e., 'legal wrong'] means that something more than mere adverse personal effect must be shown—that is, that the adverse effect must be an illegal effect. The law so made relevant is not just constitutional law but any and all applicable law." (Sen. Doc. 248 at 212.)

In the foregoing Report the congressional intent to *confer* a right to judicial review "upon any person adversely affected *in fact* by agency action" (i.e., damaged), is expressly declared. The Committee also draws a clear distinction between "a person adversely affected" and "a person suffering legal wrong" and emphasizes that the former need only be "adversely affected *in fact* (i.e., damaged) by agency action."

The court below construes the term "legal wrong" to include only those wrongs which would constitute *injuria* under prior decisions. As shown *infra*, 23-30, even under this unjustifiably restricted interpretation, Petitioners have a standing to be heard independently of the APA upon each of three independently sufficient grounds. However, that the Congress used the term "legal wrong" in a broader and more comprehensive sense, is, we think, shown by legislative history. The foregoing quotation from the report of the Senate Committee states that "legal wrong" means such a wrong as is specified in § 10(e). In explaining the bill on the floor, Senator McCarran stated that the term "legal wrong" included not only "*injuria*" as defined in prior decisions but also wrongs falling within the definition expressed in the Senate Committee Report. (Sen. Doc. 248 at 310.)

Congress made clear that under the APA the absence of express provision for judicial review is "completely immaterial." (Sen. Doc. 248 at 368, quoted *supra*, 19 fn.)

The holding of the court below (App. B 54), that neither the RE Act nor the Flood Control Act is a "relevant statute" within the meaning of the APA is erroneous and in conflict with the principle applied in *Chapman v. Federal Power Comm.*, 345 U. S. 153, 155-6. Plainly, any statute under which agency action is taken that "adversely affects" a person, is a relevant statute. Thus, both the Senate and House Committees expressly stated:

> "The law so made relevant is not just constitutional law but any and all applicable law." (Sen. Doc. 248 at 212.)

Petitioners are qualified borrowers under the RE Act* and are qualified purchasers under the Flood Control Act. (App. A 34, 36.) As hereinafter shown (*infra*, 26-8), a primary purpose of many of the limitations imposed by the Congress upon the authority of the administrators of the RE and Flood Control Acts was to prevent them from engaging in activities which, while unnecessary to achieve the respective congressional purposes, would seriously damage and possibly destroy privately owned utilities.

The APA is a remedial statute which should be liberally construed. In *Heikkila v. Barber*, 345 U. S. 229, 232, this Court said:

> "* * * The spirit of these statements (in the Senate and House Committee Reports) together with the broadly remedial purposes of the Act counsel a judicial attitude of hospitality towards the claim that

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* Curiously the majority opinion erroneously states the contrary. (App. B 56, fn. 15.)

§ 10 greatly expanded the availability of judicial review." *

The decision of the court below, that the APA does not increase the availability of judicial review but, in effect, freezes it in the posture which it occupied under the court decisions rendered prior to the passage of the Act, rests primarily upon a quotation from the Attorney General's Manual on the Administrative Procedure Act. (App. B 53-4.) This Manual was prepared *ex parte* and *ex post facto* as a guide to federal agencies, is no part of legislative history, misconstrues the Attorney General's memorandum to the Senate Committee (Sen. Doc. 248 at 223-31) and is no evidence of congressional intent. The Attorney General's memorandum to the Senate Committee, among other things, states:

> "An important decision interpreting the meaning of the terms 'aggrieved' and 'adversely affected' is *Federal Communications Commission v. Sanders Bros. Radio Station* (309 U. S. 470)." (Sen. Doc. 248, at 230.)

The natural interpretation of the memorandum, and the one obviously placed upon it by the Congress, was that the right of judicial review granted to persons adversely affected and to persons aggrieved had the meaning and scope which this Court had placed upon like terms in the *Sanders* case.

B. Conspiracy: Upon the supposed authority of *Alabama Power Co. v. Ickes*, 302 U. S. 464 and *TEP Co. v. TVA*, 306 U. S. 118, the majority of the court below held that the conspiracy alleged in the Complaint does not state

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* See also *Wong Yang Sung v. McGrath*, 339 U. S. 33, 36-41; *Shaughnessy v. Pedreiro*, 349 U. S. 48, 51; *Reade v. Ewing* (C. A. 2), 205 F. 2d 630, 631-2; *Unger v. United States* (E. D. Ill.), 79 F. Supp. 281, 286; *American President Lines v. Fed. Maritime Bd.* (D. C.), 112 F. Supp. 346, 348-9.)

a claim upon which Petitioners severally have a right to be heard. (App. B 49-50.) This decision of the majority of the court below misconstrues and misapplies, and is in conflict with, those decisions.*

A fundamental error, underlying the majority's decision and its misinterpretation of the decisions of this Court, is its failure to recognize the controlling distinction between the questions (1) whether a complaint states a claim upon which a plaintiff has a right to be heard and (2) whether, after hearing, the proof supports the right of the plaintiff to be heard.

In *Alabama Power Co. v. Ickes*, 302 U. S. 464, this Court held unassailable findings of the district court that "there was and is no conspiracy between any of the defendants and any other person"; that none of defendants had reserved any right to require any municipality to eliminate competition or to designate any person or agency from which any municipality "must purchase its power" and that neither the United States nor any defendant "has any power to control the operation of the project after construction is completed." (l. c. 477.) In all the foregoing respects the case presented by the foregoing findings is the precise converse of the case alleged in the instant Complaint and established by the findings and evidence in the district court. (*Supra*, 8-17.) Upon the foregoing findings this Court affirmed the judgment dismissing the bills but said that "If conspiracy * * * were involved a dif-

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* The majority of the court below ignore the principal, and as we believe the only, conspiracy alleged in the Complaint. Contrary to the explicit allegations of the Complaint, the majority also assumes that in each system of reciprocally conditioned contracts, which are being utilized to implement the conspiracy, the "loan contract" is wholly independent of, and unrelated to, the "lease-option," "power" and "requirements" contracts or to the conspiracy and that REA's position is merely that of a "lender of money." (Cf. App. B 49-50 and 62, 64-5.)

ferent case would be presented * * *." (l. c. 479; see also l. c. 485.) See also concurring opinion of Judge Groner below. *Alabama Power Co. v. Ickes,* 91 F. 2d 303 at 306.

In *TEP Co. v. TVA,* 21 F. Supp. 947, a three-judge court, after summarizing the conspiracy alleged in the complaint among the defendants, municipalities and cooperatives and stating that "If the record had substantiated the allegations of the bill, grave questions would have been presented," found that the allegations of conspiracy had not been proved. (l. c. 954.) In *TEP Co. v. TVA,* 306 U. S. 118, this Court recognized the long established right of a citizen to protect his business against tortious destruction threatened by such a conspiracy (l. c. 137-8) but in this aspect affirmed the judgment dismissing the bill upon the ground that the trial court's finding that the defendants had "not conspired with municipalities or other purchasers of power" was justified by the record. (l. c. 145.)

The decision of the court below is based solely on the allegations in the Complaint. Those allegations are fully established by the findings and evidence in the district court. (*Supra,* 12-17.) The district court did not find and conclude that the conspiracy had not been proved; but, even if the district court had so found and concluded, the court below could not lawfully have dismissed the Complaint for failure of proof without determining whether such a finding and conclusion would have been supported by the evidence and in accord with applicable legal principles.

C. Construction of the RE and Flood Control Acts and Petitioners' Rights to Be Heard Thereunder: The decision of the court below decides that neither the RE Act nor the Flood Control Act confers any right or interest upon Petitioners, as privately owned utilities, to maintain an action to enjoin violations of those statutes which

threaten destruction of their respective businesses. (App. B 50-2.) As hereinafter shown, this decision is either in conflict with applicable decisions of this Court or decides important questions of statutory construction which have not been, but should be, settled by this Court.

The Complaint alleges that the RE Act does not authorize, but instead forbids, the REA Administrator (among other things) to make loans to finance construction of electric facilities (1) to serve persons in rural areas who are already receiving central station service *or* (2) to serve municipalities having a population in excess of 1500 inhabitants. (*Supra*, 12; App. A 34-5.)

The Complaint also alleges that the Flood Control Act does not authorize, but among other things forbids, the Secretary of the Interior, acting personally or through SPA as his agent, (1) to purchase electricity for commercial resale to the public and, *a fortiori*, to do so for the purpose, or with the result, of increasing the quantity of electricity which SPA would otherwise have for commercial sale, *or* (2) to construct or otherwise acquire the beneficial ownership or the permanent use of electric generating stations, *or* (3) to sell any electricity except that delivered, or received in exchange for electricity delivered, to him by the Secretary of the Army, *or* (4) to construct or otherwise acquire any transmission line except pursuant to, and with the proceeds of, specific appropriations by the Congress. (*Supra*, 12; App. A 36.)

The Complaint alleges, and the findings and evidence in the district court establish, that the means being utilized to carry out the unlawful conspiracy include violations of the foregoing prohibitions or limitations in the RE Act and in the Flood Control Act. (*Supra*, 12-17.) The nature of these limitations is such that their observance necessarily protects, and under applicable rules of statutory

construction must have been intended to protect, privately-owned utilities against special damages which would be proximately caused by the prohibited acts. The legislative histories of the RE Act and of the Flood Control Act*

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* For the convenience of this Court, nine copies of the separately printed and bound appendix of legislative histories of the RE, Flood Control and Continuing Fund Acts, which was filed as an appendix to Petitioners' brief in the court below and is herein cited as "Leg. Hist. Sep. App. _____," are filed with this petition.

In explaining the REA Bill, the Chairman of the House Committee said:

"Mr. Rayburn. May I say to the gentleman that we are not, in this bill, intending to go out and compete with anybody. By this bill we hope to bring electrification to people who do not now have it. This bill was not written on the theory that we were going to punish somebody or parallel their lines or enter into competition with them. * * *" (80 *Cong. Rec.*, 5283; Leg. Hist. Sep. App. 15.)

See also quotations from Opinions of two Agriculture Department Solicitors printed in Appendix C hereto, *infra*, 69-70.

The Senate Committee Report on the Flood Control Bill states:

"* * * The committee desires an amendment which provides a convenient and practical method of disposing of power at projects under the control of the War Department without setting up a public power trust which would be unduly competitive with established private power utilities. * * *" (Sen. Rep. 1030, 78th Cong., 2d Sess. 3; Leg. Hist. Sep. App. 32-3.)

During the Senate Committee hearings, Mr. Goldschmidt (then Director of the Interior Department Division of Power) whom the Chairman had requested to submit an amendment to accomplish the Committee objective testified:

"Mr. Goldschmidt. Yes, Mr. Chairman. I took the liberty of trying to work out something, and I sent to you or gave to you subsequently a draft of an amendment that I think would be workable and would at the same time offer the committee the protection I believe it seeks."

* * * * *

"I think that the committee sought to protect the legitimate investment of the utilities from some possible imprudent construction of Federal facilities or perhaps from unwilling sales of some of their lines. I think that the committee can do that through the language that I have suggested. * * *" (Leg. Hist. Sep. App. 28, 30.)

establish that a primary purpose of the foregoing limitation upon the REA Administrator's loaning authority and upon the disposal authority of the Secretary of the Interior was to protect utilities against direct and special damage which would be caused by the forbidden acts. (Leg. Hist. Sep. App. 1-7, RE Act; 17-44, Flood Control Act.)

The duty of the administrators of the RE and Flood Control Acts to observe the limitations imposed upon their authority is no less than their duty to exercise the power granted. As the Congress has expressly stated: "The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases." (Sen. Doc. No. 248 at 275.)

The nature of a duty imposed by a statute and the protection resulting from its performance determine what persons are entitled to invoke its protection. *Fairport R. Co. v. Meredith*, 292 U. S. 589, 594-7; *A. T. & S. F. R. Co. v. Reesman* (C. C. A. 8), 60 Fed. 370, 372, 373-6. The decision of the court below is, we believe, in conflict with the foregoing decisions and with the principle applied in *Chapman v. Federal Power Comm.*, 345 U. S. 153, 156; but, if not, it decides important questions of statutory construction which have not been, but should be, settled by this Court. The *Chapman* case held that rural cooperatives' inchoate right under the Flood Control Act to purchase surplus power from a *potential* federal development of a water power site was a "substantial interest" which gave them standing, as "a person aggrieved" within the meaning of the Federal Power Act, to invoke judicial review of a Commission order licensing a private company to develop the site. (l. c. 156.) Plainly, Petitioners' interests under the RE and Flood Control Acts are much more substantial, definite and certain.

The court below also holds that absence of an express provision for judicial review in the foregoing statutes, the

obligation of the agencies to report to Congress and their recurring need to obtain appropriations from Congress, evidence a congressional intent to preclude judicial review. (App. B 50-2.) This holding is, we submit, in conflict with the principles declared in *Stark v. Wickard*, 321 U. S. 288, 307-10 and *Oklahoma v. Civil Service Comm.*, 330 U. S. 127, 136, and with the declared policy of Congress with respect to judicial review of the actions of its agencies. (*Supra*, 19 fn.) Contrary to the majority's assumption (App. B 52, fn. 10), the Committee Reports upon Interior Department Appropriation Bills constitute a congressional interpretation of the foregoing statutes as authorizing, and a congressional approval of, judicial review. (H. Rept. No. 1628, 82d Cong., 2d Sess. (1952); H. Rept. No. 2451, 82d Cong., 2d Sess. (1952); S. Rept. No. 1803, 82d Cong., 2d Sess. (1952); Leg. Hist. Sep. App. 91-3.)

D. Petitioners' Rights to Be Heard in Protection of Their Non-exclusive Franchises: Upon the supposed authority of *Alabama Power Co. v. Ickes*, 302 U. S. 464 and *TEP Co. v. TVA*, 306 U. S. 118, the majority of the court below holds that Petitioners have no standing to maintain an action to enjoin the invasion of their property rights in non-exclusive franchises imminently threatened by Respondents acting *as private individuals* pursuant to the conspiracy alleged in the Complaint. (App. B 47-8.)

Upon the facts alleged in the Complaint and established by the findings and evidence, Respondents, who hold no franchise, will be engaged as *private individuals* in carrying on the electric utility business in Petitioners' service territories. A non-exclusive franchise is property which its owner has a standing to protect against invasion by a person acting without a like franchise or under a void franchise. *Frost v. Corp. Comm.*, 278 U. S. 515; *Corp. Comm. v. Lowe*, 281 U. S. 431, 435; *Gallardo v. Porto Rico*

Ry. L. & P. Co. (C. C. A. 1), 18 F. 2d 918, 922; *Campbell v. Arkansas-Missouri Power Co.* (C. C. A. 8), 55 F. 2d 560, 562; *Central Ill. Pub. Serv. Co. v. Bushnell* (C. C. A. 7), 109 F. 2d 26, 29; *Kansas Gas & El. Co. v. Independence* (C. C. A. 10), 79 F. 2d 32, 35. The decision of the court below is, we believe, in conflict with the foregoing decisions but, if not, then it decides an important question of federal law which has not been, but should be, settled by this Court.

Under the findings in the *Alabama Power Co. v. Ickes,* 302 U. S. 464, which presented the converse of the factual situation alleged in the Complaint and established by the findings and evidence in the instant case (*supra,* 24), those defendants, whether acting lawfully or unlawfully, were merely lenders of money and would not engage in the electric utility business at all.

In *TEP Co. v. TVA,* 306 U. S. 118, the trial court had expressly found that the defendants, municipalities, co-operatives and other purchasers of power had not conspired. (*Supra,* 25.) All of the States, in which TVA was operating or threatening to operate, had expressly authorized TVA to engage in the electric utility business except Mississippi which did not require any franchise for that purpose. Such a classification did not deny equal protection of law to the plaintiff companies. (l. c. 140-2, 143.) No invasion of those plaintiffs' non-exclusive franchises could occur.

E. Respondents' Other Objections to Judicial Examination of Their Actions Which Were Not Considered by the Court Below: Respondents' contentions, that this is an action against the United States and that the Super Co-ops are indispensable parties, were twice overruled by the district court but were not passed upon by the court below. (R. 104, 107-8; App. B 58, 62.)

1. An action to enjoin federal officers from exceeding their statutory authority is not an action against the United States unless the relief sought would require "affirmative action by the sovereign or the disposition of unquestionably sovereign property." *Larson v. Domestic & Foreign Corp.*, 337 U. S. 682, 691, fn. 11; *United States v. Lee*, 106 U. S. 196; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 619-20; *Lane v. Watts*, 234 U. S. 525, 540. The relief here sought does not require either. The fact, that unauthorized acts of a federal officer include the unauthorized making of a contract with private persons, does not enable him to claim sovereign immunity for this wrongdoing. *Land v. Dollar*, 330 U. S. 731, 738-9.

2. In an action against some parties to a conspiracy, other participants in the conspiracy are not indispensable parties. *Georgia v. Penn. R. Co.*, 324 U. S. 439, 463, fn. 9; *Davis v. Las Ovas Co.*, 227 U. S. 80, 87. Petitioners' claims do not arise from or depend upon the systems of contracts which are merely part of the means utilized by the conspirators to implement their conspiracy. Such contractual rights, if any, as the Super Co-ops may have against their fellow conspirators, are clearly separable. *Shields v. Barrow*, 17 How. 130, 140. Assuming that an injunction against carrying out the conspiracy would affect the ability of Respondents to perform any contracts between them and the Super Co-ops, the Super Co-ops are not indispensable parties. *National Licorice Co. v. N. L. R. B.*, 309 U. S. 350, 363-4, 365, 366; *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 300; *United States v. Louisiana*, 339 U. S. 699, 702.

F. Great Public Importance of Prompt Settlement of Questions Presented: The construction of the APA by the court below presents questions of statutory construction

which are vitally important in the daily administration of justice in the federal courts. Cf. *Hickman v. Taylor*, 329 U. S. 495, 497. In holding Petitioners have no right to be heard, the court below also construes the RE and Flood Control Acts in respects which are of great and nationwide importance. The court below did not review the district court's construction of the foregoing statutes in other respects which are highly important in their daily administration,* vitally affect thousands of citizens throughout the country and present questions of statutory construction and a question of federal constitutional authority that separately and collectively are of the highest importance to the public.** The decision of those questions by the district court is, we believe, erroneous. Their *prompt* settlement is of the greatest public importance and can be effected only by a decision of this Court. Consequently the Petitioners urge this Court not only to review and reverse the decision of the court below but to decide the other important questions which that court should have decided.

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* As to administration of the Flood Control Act, see quotations from statement made before the Senate Judiciary Committee (Jan. 21, 1954) by the then Solicitor and now Undersecretary of the Interior Department printed in Appendix C hereto, *infra* 67-9.

** E.g., the holding of the district court, that the foregoing statutes are constitutional when construed to authorize the Secretary of the Interior to purchase thermal power and energy for commercial resale to the public, is not only of manifest importance but misconstrues, and is in conflict with, *Ashwander v. TVA*, 297 U. S. 288, 340. The district court's unrealistic holding that the carrying out of the conspiracy would not produce a result contrary to the terms and policy of the RE and Flood Control Acts, is, we believe, in conflict with *United States v. San Francisco*, 310 U. S. 16, 28.

CONCLUSION.

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

SECTIONS 4 AND 13 OF THE RURAL ELECTRIFICATION ACT OF 1936, AS AMENDED:

4. "The Administrator is authorized and empowered, from the sums hereinbefore authorized, to make loans for rural electrification to persons, corporations, States, Territories, and subdivisions and agencies thereof, municipalities, peoples' utility districts and cooperative, nonprofit, or limited-dividend associations, organized under the laws of any State or Territory of the United States, for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service, and loans, from funds available under the provisions of sections 903(d) and 903(e) of this title but without regard to the 10 per centum limitation therein contained, to cooperative associations and municipalities for the purpose of enabling said cooperative associations and municipalities to the extent that such indebtedness was incurred with respect to electric transmission and distribution lines or systems or portions thereof serving persons in rural areas, to discharge or refinance long-term debts owed by them to the Tennessee Valley Authority on account of loans made or credit extended under the terms of sections 831-831c and 831d-831dd of Title 16: *Provided,* That the Administrator, in making such loans, shall give preference to States, Territories, and subdivisions and agencies thereof, municipalities, peoples' utility districts, and cooperative, nonprofit, or limited-dividend associations, the projects of which comply with the requirements of this chapter. Such loans shall be on such terms and conditions relating to the expenditure of the moneys loaned and the security therefor as the Administrator shall determine and may be made payable in whole or in part out of the income: *Provided further,* That all such loans shall be self-liquidating within a period of not to exceed thirty-five years, and shall bear interest at the rate

of 2 per centum per annum; interest rates on the unmatured and unpaid balance of any loans made pursuant to this section prior to September 21, 1944, shall be adjusted to 2 per centum per annum, and the maturity date of any such loans may be readjusted to occur at a date not beyond thirty-five years from the date of such loan: *And provided further,* That no loan for the construction, operation, or enlargement of any generating plant shall be made unless the consent of the State authority having jurisdiction in the premises is first obtained. Loans under this section and section 905 of this title shall not be made unless the Administrator finds and certifies that in his judgment the security therefor is reasonably adequate and such loan will be repaid within the time agreed." Act of May 20, 1936, c. 432, Title I, § 4, 49 Stat. 1365; Act of Sept. 21, 1944, c. 412, Title V, §§ 502(a), 503, 58 Stat. 739-40; Act of Dec. 23, 1944, c. 725, 58 Stat. 925-6; Act of June 29, 1948, c. 703, 62 Stat. 1070; and Act of October 28, 1949, c. 776, §§ 2, 4(e), 63 Stat. 948; U. S. C. A., Title 7, § 904.

13. "As used in this chapter the term 'rural area' shall be deemed to mean any area of the United States not included within the boundaries of any city, village, or borough having a population in excess of fifteen hundred inhabitants, and such term shall be deemed to include both the farm and nonfarm population thereof; the term 'farm' shall be deemed to mean a farm as defined in the publications of the Bureau of the Census; the term 'person' shall be deemed to mean any natural person, firm, corporation, or association; the term 'Territory' shall be deemed to include any insular possession of the United States." Act of May 20, 1936, c. 432, Title I, § 13, 49 Stat. 1367; Act of Oct. 28, 1949, c. 776, § 2, 63 Stat. 948; U. S. C. A., Title 7, § 913.

SECTION 5 OF THE FLOOD CONTROL ACT OF 1944, AS AMENDED:

"Electric power and energy generated at reservoir projects under the control of the Department of the Army and in the opinion of the Secretary of the Army not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and energy shall be given to public bodies and cooperatives. The Secretary of the Interior is authorized, from funds to be appropriated by the Congress, to construct or acquire, by purchase or other agreement, only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies. All moneys received from such sales shall be deposited in the Treasury of the United States as miscellaneous receipts." Act of Dec. 22, 1944, c. 665, § 5, 58 Stat. 890; Act of July 26, 1947, c. 343, Title II, § 205(a), 61 Stat. 501; U. S. C. A., Title 16, § 825s.

SECTION 10 OF THE ADMINISTRATIVE PROCEDURE ACT:

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

"Rights of review

"(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"Form and venue of proceedings

"(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

"Acts reviewable

"(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

"Relief pending review

"(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

"Scope of review

"(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error." Act of June 11, 1946, c. 324, § 10, 60 Stat. 243-4; U. S. C. A., Title 5, § 1009.

THE SO-CALLED CONTINUING FUND ACT:

1. The so-called Continuing Fund Act in its form at the time this action was filed:

"All receipts from the transmission and sale of electric power and energy under the provisions of section 5 of the Flood Control Act of December 22, 1944 (16 U. S. C. 825s), generated or purchased in the southwestern power area, shall be covered into the Treasury of the United States as miscellaneous receipts, except that the Treasury shall set up and maintain from such receipts a continuing fund of $300,000, including the sum of $100,000 in the continuing fund established under the Administrator of the Southwestern Power Administration in the First Supplemental National Defense Appropriation Act, 1944 (57 Stat. 621), which shall be transferred to the fund hereby established; and said fund of $300,000 shall be placed to the credit of the Secretary and shall be subject to check by him to defray emergency expenses necessary to insure continuity of electric service and continuous operation of the facilities, and to cover all costs in connection with the purchase of electric power and energy and rentals for the use of facilities for the transmission and distribution of electric power and energy to public bodies, cooperatives, and privately owned companies." Act of Oct. 12, 1949, c. 680, Title I, 63 Stat. 767.

2. The so-called Continuing Fund Act as it was amended in the Act of August 31, 1951, c. 375, Title I, 65 Stat. 249; U. S. C. A., Title 16, § 825s-1:

"All receipts from the transmission and sale of electric power and energy under the provisions of section 5 of the Flood Control Act of December 22, 1944 (16 U. S. C. 825s), generated or purchased in the southwestern power area, shall be covered into the Treasury of the United States as miscellaneous receipts, except that the Treasury shall set up and maintain from such receipts a continuing fund of $300,000, including the sum of $100,000 in the continuing fund established under the Administrator of the Southwestern Power Administration in the First

Supplemental National Defense Appropriation Act, 1944 (57 Stat. 621), which shall be transferred to the fund hereby established; and said fund of $300,000 shall be placed to the credit of the Secretary and shall be subject to check by him to defray emergency expenses necessary to insure continuity of electric service and continuous operation of the facilities, and to cover all costs in connection with the purchase of electric power and energy and rentals for the use of facilities for the transmission and distribution of electric power and energy to public bodies, cooperatives, and privately owned companies: *Provided*, That expenditures from this fund to cover such costs in connection with the purchase of electric power and energy and rentals for the use of facilities are to be made only in such amounts as may be approved annually in appropriation Acts [and for the fiscal year 1952 such expenditures may be made not in excess of $250.000]." [1]

EXCERPT FROM THE INTERIOR DEPARTMENT APPROPRIATION ACT, 1953:

"Construction, Southwestern Power Administration

"For construction and acquisition of transmission lines, substations, and appurtenant facilities, and for administrative expenses connected therewith, in carrying out the provisions of section 5 of the Flood Control Act of 1944 (16 U. S. C. 825s), as applied to the southwestern power area, to remain available until expended, $4,150,000, of which $1,130,000 is for liquidation of obligations incurred pursuant to authority previously granted.

"Operation and Maintenance, Southwestern Power Administration

"For necessary expenses of operation and maintenance of power transmission facilities and of marketing electric power and energy pursuant to the provisions of section 5 of the Flood Control Act of 1944 (16 U. S. C.

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[1] The material enclosed in brackets is omitted in U. S. C. A., Title 16, § 825s-1.

825s), as applied to the southwestern power area, $1,450,000.

"Administrative Provisions

"Appropriations of the Southwestern Power Administration shall be available for purchase of not to exceed fifteen passenger motor vehicles for replacement only. Appropriations made herein to the Southwestern Power Administration shall be available in one fund, except that the appropriation herein made for operation and maintenance shall be available only for the service of the current fiscal year.

"Continuing Fund, Southwestern Power Administration

"Not to exceed $1,000,000 shall be available during the current fiscal year from the continuing fund for all costs in connection with the purchase of electric power and energy and rentals for the use of transmission facilities." Act of July 9, 1952, c. 597, Title I, 66 Stat. 446.

APPENDIX B.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.*

(April 28, 1955.)

Before PRETTYMAN, BAZELON and WASHINGTON, Circuit Judges.

WASHINGTON, *Circuit Judge*: This case involves the question whether utility companies which claim they are in competition with a federally-supported power program can obtain the aid of the courts in challenging the validity of that program.

Plaintiffs-appellants, electric utility companies operating in Kansas, Missouri and Arkansas, ask for relief under the Declaratory Judgment Act, 28 U. S. C. §§ 2201-2 (1952), against the Secretaries of the Interior, Agriculture and the Treasury and the Administrators of the Southwestern Power Administration ("SPA") and of the Rural Electrification Administration ("REA") as defendants: (1) enjoining them from lending or disbursing funds of the United States to SPA or to certain federated power cooperatives for the construction by the latter of electric generating and transmission facilities and for the sale and purchase of electric power to and from them by SPA; (2) enjoining them from doing anything in furtherance of an alleged plan by which SPA would in effect construct and acquire control of these generating and transmission facilities contrary to law; and (3) declaring that they have no right, power or authority to carry out the alleged plan.

Defendants moved to dismiss the complaint for the reason, among others, that plaintiffs did not have the capacity, and did not show any injury or interest entitling

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* As revised by order dated June 10, 1955.

them, to maintain the suit. The District Court denied the motion to dismiss on the ground that the instant case does not fall within the rule of *Alabama Power Co. v. Ickes*, 302 U. S. 464 (1938). Thereafter, upon trial of the issue of the legality of the loan contracts and lease agreements entered into by the defendants, the District Court held that those contracts and agreements were valid and authorized by the Rural Electrification Act and the Flood Control Act of 1944, respectively. From the final judgment for the defendants the plaintiffs, other than Missouri Edison Company, have appealed.

Defendants SPA and REA have made contracts with five federated cooperatives,[1] including Northwest Electric Power Cooperative, Inc. ("Northwest"). The contracts with Northwest, which are substantially the same as the contracts with the others, will be summarized. The Government, acting through REA, for "the purpose of furnishing electric energy to persons not receiving central station electric service" has agreed to lend Northwest money for the construction of an electric generating plant and transmission lines, substations, transformers and related facilities in certain described rural areas. Northwest is obligated to repay the loan within 35 years, which the revenue derived from the sale of the newly-created power output will enable it to do. Under a separate agreement with SPA, Northwest is to construct a transmission line from the Government-owned Bull Shoals Reservoir in Arkansas to the proposed generating plant, and is to lease the line to SPA for a period of 40 years, with an option to purchase. Northwest also agrees to sell to SPA

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[1] Northwest Electric Power Cooperative, Inc. ("Northwest"); KAMO Electric Cooperative, Inc. ("KAMO"); Central Electric Power Cooperative ("Central"); Sho-me Power Corporation ("Sho-me"); and M.&A. Electric Power Cooperative ("M.&A.").

the power output of the new generating plant and SPA in turn will supply Northwest at a single delivery point with its power requirements. In case SPA cannot furnish all the power needed by Northwest, the latter may buy additional power from any available source.

Plaintiffs are electric power utilities, supplying electric service to a large number of customers in Missouri, Kansas and Arkansas, including rural electric distribution cooperatives to whom central station service is rendered. None of them has exclusive franchises to supply electric power. They have programs, in various stages of planning or execution, to expand their facilities to meet estimated increases in demand for electric energy from all of these consumers and customers. They claim that the contractual arrangements made by REA and SPA with the federated cooperatives will thwart their plans and duplicate their facilities (existing, under construction, or authorized), which are or will be available to serve the federated cooperatives' demand for central station service. They contend that the contracts violate the loan standards of the Rural Electrification Act of 1936;[2] that SPA's power rates are uneconomical, and that the congressionally-imposed restrictions on SPA's activities have been violated, contrary to the provisions of the Flood Control Act of 1944;[3]

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[2] Under the Rural Electrification Act, 7 U. S. C. §§ 901 *et seq.* (1952), the Administrator of the REA is empowered to make loans to cooperative associations for the purpose of "financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service." 7 U. S. C. § 904 (1952). Such loans may not extend beyond 35 years and carry interest at 2 per cent. 7 U. S. C. §§ 903(a), 904 (1952).

[3] This Act, 33 U. S. C. §§ 701-1 *et seq.*, 16 U. S. C. §§ 825s *et seq.* (1952), authorizes the Secretary of the Army to engage in

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that the contracts enable the federated cooperatives to engage in destructive federally-subsidized competition with plaintiffs; and that the defendants (other than the Secretary of the Treasury) are misusing the lending powers of REA to obtain for SPA control or ownership of the large steam generating plants and transmission lines built by the federated cooperatives, contrary to the intent of Congress, the Constitution and the laws above referred to.

It is indisputable that the essence of plaintiffs' complaint is the competition which they will suffer if the Government's contracts are carried out. They can claim no other interest or injury. The defendants have not undertaken to regulate them in any way. They have not been ordered to abandon any of their activities or to forego the expansion programs planned by them. They have not been subjected to any obligation or duty. Their sole interest and objective is to eliminate the competition which they fear. Controlling decisions of the Supreme Court, dealing with other electric power contracts of the Federal Government, establish that an interest of this kind is not sufficient to enable them to sue to enjoin exe-

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flood control work and to improve navigation through reservoir or other projects. Section 5 (16 U. S. C. § 825s) directs that electric energy and power generated at reservoir projects under Army control and not required in their operation shall be delivered to the Secretary of the Interior for transmission and disposal "in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission." To effectuate such sales the Secretary of the Interior is authorized to construct, or acquire with funds appropriated by Congress, transmission lines and related facilities needed to make the power generated at the reservoirs available in wholesale quantities to various classes of purchasers including public bodies and cooperatives. The proceeds from the sales of such energy are to be paid into the general fund of the Treasury.

cution of the power contracts and program of the Government. See *Alabama Power Co. v. Ickes*, 302 U. S. 464 (1938); *Duke Power Co. v. Greenwood County*, 302 U. S. 485 (1938); *Tennessee Power Co. v. T. V. A.*, 306 U. S. 118 (1939).

In the *Alabama Power* case, suit was brought to enjoin the execution of contracts for the lending and grant of money to certain cities for the construction of municipal electric distribution systems, on the ground in part that the contracts were not authorized by statute. It was contended that such contracts would establish rival and competing plants resulting in loss of business to the plaintiff. The Supreme Court, affirming this court, took the view that the power company was without standing to challenge the validity of the contracts by suit. The Court stated:

> "The only pertinent inquiry, then, is what enforceable legal right of petitioner do the alleged wrongful agreements invade or threaten? If conspiracy or fraud or malice or coercion were involved a different case would be presented, but in their absence, plainly enough, the *mere* consummation of the loans and grants will not constitute an actionable wrong. Nor will the subsequent application by the municipalities of the moneys derived therefrom give rise to an actionable wrong, since such application, being lawful, will invade no legal right of petitioner. The claim that petitioner will be injured, perhaps ruined, by the competition of the municipalities brought about by the use of the moneys, therefore, presents a clear case of *damnum absque injuria*. Stated in other words, these municipalities have the right under state law to engage in the business in competition with petitioner, since it has been given no exclusive franchise. If its business be curtailed or destroyed by the operations of the municipalities, it will be by lawful competition

from which no legal wrong results." 302 U. S. at 479-480.

The Court further made it clear that one whose only injury will result from lawful competition has no standing to question whether the contracts with the municipalities were authorized by statute and thus legal. It said:

> "Can anyone who will suffer injurious consequences from the lawful use of money about to be unlawfully loaned maintain a suit to enjoin the loan? An affirmative answer would produce novel and startling results. * * * Considered apart, the lender owes the sufferer no enforcible duty to refrain from making the unauthorized loan; and the borrower owes him no obligation to refrain from using the proceeds in any lawful way the borrower may choose." 302 U. S. at 480.

Appellants undertake to escape the impact of this case on three grounds. First, they say, as did the District Court, that in the *Alabama* case the competition was lawful, whereas here it is unlawful, since none of the defendants, all Federal officers and agencies, have any franchise to supply electric power to the public from the States involved.[4] But *Tennessee Power Co. v. TVA, supra,* which followed the *Alabama* case, shows that any competition which may result from the contractual arrangements of the Federal agencies here cannot be regarded as unlawful. In that case various public utility companies which generated, distributed and sold electricity in the States within the TVA area sued to enjoin the Authority from generating, distributing, and selling electric power in duplication of, or competition with, any of their services. The Supreme

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[4] There is no contention that the federated cooperatives do not possess franchises to generate, distribute, and sell electric power.

Court denied their capacity to maintain the suit on the reasoning employed in the *Alabama Power* opinion. 306 U. S. 139-140.[5] It rejected the contention that the competition which the Authority's program would provide was illegal, pointing out that the charters and franchises awarded to the public utility companies did not "involve the grant of a monopoly or render competition illegal." 306 U. S. at 139.[6] So here, appellants point to no provision in their charters which purports to grant them a monopoly or to protect them from competition by a Federal instrumentality, with the result that they have no basis for asserting that the competition which will be provided by SPA's activities is illegal as to them. This is not to say, of course, that even if the franchises granted by the States had contained provisions purporting to protect the power companies from Federal competition, it would have any effect as against the Federal Government.

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[5] "The appellants further argue that even if invasion of their franchise rights does not give them standing, they may, by suit, challenge the constitutionality of the statutory grant of power the exercise of which results in competition. This is but to say that if the commodity used by a competitor was not lawfully obtained by it the corporation with which it competes may render it liable in damages or enjoin it from further competition because of the illegal derivation of that which it sells. If the thesis were sound, appellants could enjoin a competing corporation or agency on the ground that its injurious competition is *ultra vires*, that there is a defect in the grant of powers to it, or that the means of competition were acquired by some violation of the Constitution. The contention is foreclosed by prior decisions that the damage consequent on competition, otherwise lawful, is in such circumstances *damnum absque injuria*, and will not support a cause of action or a right to sue."

[6] Although some of the individual States had exempted Federal agencies from the jurisdiction of their public utilities commissions, the opinion of the Supreme Court obviously did not turn on this. Indeed, the Court said: "The Authority's action in these states is consonant with state law, but, as has been shown, if the fact were otherwise, the appellants would have no standing to restrain its continuance." 306 U. S. at 142.

Second, appellants attempt to differentiate their case from the *Alabama Power* and the *Tennessee Power* cases on the ground that here they have alleged an unlawful conspiracy against them by the defendant Government officials and agencies. They summarize their claim of conspiracy as one of concerted action among the appellees to injure their businesses by unlawful means, i.e., by violations of the Rural Electrification Act and the Flood Control Act. It is contended that in neither the *Alabama* nor the *Tennessee* case was the conspiracy which was alleged based on violations of statutes.

In the *Alabama* case, however, as our opinion states, 67 App. D. C. at 231, a conspiracy was alleged, based in part on the claim that the actions there were unconstitutional, that is, violated the Federal Constitution. The District Court found that no conspiracy existed. Both this court and the Supreme Court held that the plaintiffs had no standing to sue and dismissed the complaint. It is true that the Supreme Court stated that, if "conspiracy" were involved, a different case would be presented, 302 U. S. at 479, but in view of the allegations of the complaint in that case, its view must have been that the charge of conspiracy as there stated gave no standing to sue. Certainly here then, where the charge of conspiracy is hinged, as appellants state, on the doing of acts allegedly in violation of statutes, the result must be the same.

In the *Tennessee Power* case there were allegations of conspiracy between the Public Works Administrator (acting under the PWA statute) and TVA officials (acting under the TVA statute, alleged to be unconstitutional) to injure appellants' business. The District Court made findings negativing these allegations. The Supreme Court accepted these findings, and indicated that concerted ac-

tion and cooperation between Federal officials, acting under different acts, in establishing a power program in competition with utility companies, "does not spell conspiracy to injure their business." 306 U. S. at 147. The Court's conclusion was that, notwithstanding allegations of conspiracy on the part of TVA officials to do unlawful acts in violation of the Constitution, in no aspect of the case did the power companies have standing to maintain the suit. The inevitable conclusion here then must be that conspiracy allegations of the type made here—based on allegedly unlawful acts in violation of statutes—do not establish a right to sue.[7]

Third, appellants seek to distinguish the *Alabama* and *Tennessee* cases on the ground that the plaintiffs in those cases did not claim a right to maintain the action under the statutes involved, whereas in this case they do claim a right to sue under the REA and the Flood Control Act. But we think these acts do not support their claim.

Neither the Rural Electrification Act, the Flood Control Act of 1944 nor the "continuing fund" [8] and other ap-

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[7] In the case before us, the District Court has made no specific finding that the defendants have not been guilty of conspiracy. But it did find that the contracts made by them are valid and authorized by the statutes, thus removing the only basis for the charge of conspiracy urged by appellants. If we may consider the findings of the District Court in connection with our consideration of appellants' capacity to sue, as the Supreme Court appears to have done in the Tennessee Power case, then plainly the allegations of conspiracy are without foundation. But we need not rely on those findings.

[8] In the First Supplemental National Defense Appropriation Act, 1944, 57 Stat. 621, Congress created a continuing fund of $100,000 under the SPA Administrator, which was increased to $300,000 in 1949. The purpose of establishing this fund was "to defray emergency expenses necessary to insure continuity of electric service and continuous operation of the facilities and to cover all costs in connection with the purchase of electric power

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propriation acts referred to in these proceedings provides for judicial, or indeed even administrative, review of action taken by the respective agencies.[9] These statutes differ sharply from the Transportation Act, 1920, which specifically authorized suits for injunction by any "party in interest." Thus cases arising under that statute, such as *Singer & Sons v. Union Pacific R. Co.*, 311 U. S. 295, 303-304 (1940), upon which appellants rely, have no relevance here. Nor do the statutes here create funds to which appellants have a specific right—a right not abridgeable by illegal administrative action—as had the State of Oklahoma in the road funds involved in *Oklahoma v. Civil Service Commission*, 330 U. S. 127 (1947), or as the milk producers had to the fund for support payments in *Stark v. Wickard*, 321 U. S. 288 (1944). The statutory scheme now before us clearly contemplates Congressional, rather than judicial, review of the governmental activities here in question, all of which are non-regulatory and which include disposal of surplus electric power turned over to the SPA by the Department of the Army. Congress has

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and energy and rentals for the use of facilities for the transmission and distribution of electric power and energy to public bodies, cooperatives and privately owned companies." 16 U. S. C. § 825s-1 (1952). With the evident purpose of nailing down its control over the expenditure of this continuing fund in unmistakable terms, Congress amended the Act in 1951 to provide that "expenditures from this fund to cover such costs in connection with the purchase of electric power and energy and rentals for the use of facilities are to be made only in such amounts *as may be approved annually in the appropriation Acts.*" (Italics added.) 65 STAT. 249, 16 U. S. C. § 825s-1 (1952).

[9] We need not inquire here whether action taken by the Federal Power Commission in settling rates for the sale of power by the Secretary of the Interior under the Flood Control Act may be reviewed by the courts at the instance of any interested party. No such question is now before the court.

reserved for itself control over such activities through the power of making annual appropriations for the executive departments affected, and by providing specifically that the contingent fund created by Section 5 of the Flood Control Act of 1944, 16 U. S. C. § 825s-1, may be expended only to the extent of annual appropriations for the purposes of the Act. The continuance of defendants' activities here complained of is therefore subject to review by Congress acting each year on the appropriations sought by the defendants.[10] It is not—under the controlling precedents—subject to review by this court.[11]

Appellants seek, finally, to base their right to bring this action on their alleged status as persons "suffering legal wrong" or "adversely affected or aggrieved" within

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[10] See note 8, *supra*. Congress has granted to the Department of the Interior the funds necessary to allow SPA to proceed. *E.g.*, Public Law 172, 83rd Cong., 1st Sess. (1953), 67 STAT. 261-62; Public Law 465, 83rd Cong., 2d Sess., 68 STAT. 361 (1954), providing funds for operation and maintenance as well as for the continuing fund under Section 5 of the Flood Control Act of 1944. In so viewing the statutory scheme we are aware that the Committees of the 82nd Congress have stated that action in appropriating funds for SPA was not intended to prejudge the validity of the SPA contracts involved nor as a congressional interpretation of applicable law. S. Rept. No. 1803, 82nd Cong., 2d Sess. (1952); H. Rept. No. 2451, 82nd Cong., 2d Sess. (1952). But our view of the legal import of the statutory scheme as a whole is not dependent on the making or denial of appropriations to SPA in any particular year.

[11] Appellants contend that they are members of a special class for the benefit and protection of which the statutes in question imposed a duty on the defendant public officers to refrain from acting as they have done. But we find nothing in the statutes which creates any duty to benefit and protect public utility companies. Rather it seems plain that Congress reserved the right to supervise the activities of the agencies involved, including the protection of utility companies. Without some special provision for judicial review, we cannot disregard the long established rule that a utility company, the only interest of which is that it may suffer from the competition of a public power program, cannot enjoin the execution of that program.

the meaning of Section 10(a) of the Administrative Procedure Act.[12] 5 U. S. C. § 1009(a) (1952). But the Act does not help appellants. The text of Section 10(a) reads:

> "SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> "(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

The terms used in this section are terms of art. As the Attorney General's Manual on the Administrative Procedure Act points out: "The delicate problem of the draftsmen was to identify in general terms the persons who are entitled to judicial review. As so used, 'legal wrong' means such wrong as particular statutes and the courts have recognized as constituting grounds for judicial review. 'Adversely affected or aggrieved' has frequently been used in statutes to designate the persons who can obtain judicial review of administrative action.[7] [[7] See section 9 of the Securities Act (15 U. S. C. 77i), 'any person aggrieved'; section 402(b) (2) of the Communications Act (46 U. S. C. 402), 'person aggrieved or whose interests are adversely affected'; section

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[12] The absence of a provision for judicial review in the relevant statutes does not ipso facto negate by implication the right to judicial review under the preclusion clause of Section 10 of the Administrative Procedure Act. Airline Dispatchers Ass'n v. National Mediation Board, 89 U. S. App. D. C. 24, 189 F. 2d 685, *cert. denied*, 342 U. S. 849 (1951). But preclusion of judicial review might well be implied here from the statutory scheme involved, at least as we view it, though we do not need to go that far. *Cf.* Chicago & Southern Air Lines v. Waterman S. S. Corp., 333 U. S. 103 (1948); Trans World Airlines v. Civil Aeronautics Board, 184 F. 2d 66 (2d Cir. 1950), *cert. denied*, 340 U. S. 941 (1951).

1006 of the Civil Aeronautics Act (49 U. S. C. 646), 'person disclosing a substantial interest in such order.'] The determination of who is 'adversely affected or aggrieved * * * within the meaning of any relevant statute' has 'been marked out largely by the gradual judicial process of inclusion and exclusion, aided at times by the courts' judgment as to the probable legislative intent derived from the spirit of the statutory scheme'. Final Report, p. 83; see also pp. 84-85. The Attorney General advised the Senate Committee on the Judiciary of his understanding that section 10(a) was a restatement of existing law. More specifically he indicated his understanding that section 10(a) preserved the rules developed by the courts in such cases as *Alabama Power Co. v. Ickes*, 302 U. S. 464 (1938); *Massachusetts v. Mellon*, 262 U. S. 447 (1923); *The Chicago Junction Case*, 264 U. S. 258 (1924); *Sprunt & Son v. U. S.*, 281 U. S. 249 (1930); *Perkins v. Lukens Steel Co.*, 310 U. S. 113 (1940); and *Federal Communications Commission v. Sanders Brs. Radio Station*, 309 U. S. 470 (1940). Sen. Rep. p. 44 (Sen. Doc. p. 230). This construction of section 10(a) was not questioned or contradicted in the legislative history.[8] [[8]See *American Stevedores, Inc. v. Porello*, 330 U. S. 446 (1947).] Also implied is the continuing role of the courts in determining, in the context of constitutional requirements and the particular statutory pattern, who is entitled to judicial review" (p. 96).

Section 10(a) is for the benefit of "any person suffering legal wrong," that is, one whose legal rights have been violated. As we have seen, these plaintiffs cannot effectively make such a claim. Nor are we confronted with any relevant statute within the meaning of which the plaintiffs are "adversely affected or aggrieved."

Section 10(b) of the Administrative Procedure Act does not help appellants.[13] The reference in that section to "any court of competent jurisdiction" does not of itself establish the jurisdiction of the Federal courts over an action not otherwise cognizable by them. Section 10(b) does not render competent a court which lacks jurisdiction on any other ground. *Blackmar v. Guerre*, 342 U. S. 512 (1952); *Almour v. Pace*, 90 U. S. App. D. C. 63, 193 F. 2d 699 (1951); *Aktiebolaget Bofors v. United States*, 90 U. S. App. D. C. 92, 194 F. 2d 145 (1951).

Although we thus arrive at the conclusion that the review provisions of the Administrative Procedure Act do not provide the appellants here with standing to sue, we are mindful of the fact that "it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear." *Wong Yang Sung v. McGrath*, 339 U. S. 33, 41 (1950).[14] The instant case does

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[13] "SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

* * * * *

"(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law." 5 U. S. C. § 1009(b) (1952).

[14] See also the statement of Mr. Justice Clark in Heikkila v. Barber, 345 U. S. 229, 232 (1953), where he referred to the Senate and House Committee reports on the Administrative Procedure Act and added: "The spirit of these statements together with the

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not, however, involve such evils. While in the light of the decisions of the Supreme Court we would certainly be prepared to hold in an appropriate case that one who complains of administrative action may find a remedy under the Act beyond the strict scope of judicial review recognized prior to its adoption, no judicially enforceable right of plaintiffs has been disregarded by the administrative action brought before us for review. There exists, therefore, no basis for recognizing plaintiffs' standing to bring this action under the judicial review provisions of the Administrative Procedure Act.[15]

Neither the pleadings nor the record before us suggests any other basis on which the plaintiffs would have standing to sue. Clearly, plaintiffs' interest as citizens, property owners, or franchise holders considered separately from, and not merely in aid of, their right to challenge alleged unlawful competition, confers no standing upon them to challenge defendants' actions in the courts. Merely as such, their status is no different from that of ordinary taxpayers who would not have standing to sue here. *Massachusetts v. Mellon*, 262 U. S. 447 (1923).

(Continued from preceding page)

broadly remedial purposes of the Act counsel a judicial attitude of hospitality towards the claim that § 10 greatly expanded the availability of judicial review." *Cf.* Frankfurter, *J.*, dissenting: "* * * the Administrative Procedure Act should be treated as a far-reaching remedial measure, affording ready access to courts for those who claim that the administrative process, once it has come to rest, has disregarded judicially enforceable rights." *Id.* at 237, 238.

[15] It may, moreover, be doubted whether the agency action here involved (consisting of the making of loans to and contracts with qualified parties, which plaintiffs are not) constitutes agency action within the meaning of Section 2 (g) of the Act, 5 U. S. C. § 1001 (g), which this court could review if plaintiffs were within the provisions of Section 10 (a) of the Act. See Hearst Radio v. Federal Communications Commission, 83 U. S. App. D. C. 63, 167 F. 2d 225 (1948).

Nor does this case fit the type of situation in which parties economically affected by *regulatory* action on the part of the Government have been held entitled to seek judicial relief, whether the Government has taken action specifically directed against plaintiff or whether the action taken threatens to affect plaintiff's interest adversely though not singling him out specifically. In many such cases of directory or restrictive governmental action, the courts have taken jurisdiction pursuant to specific judicial review provisions in the regulatory statute,[16] under the Administrative Procedure Act,[17] or in the exercise of their general equity powers.[18] But where, as here, there is no "legislative declaration of rights,"[19] no regulatory action by the Government, and no special provision for judicial review enlarging on the constitutional equity powers of the Federal courts, plaintiff can appeal only to those equity powers, and he must show more than that he is merely a person economically affected or otherwise aggrieved by some governmental activity.[20]

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[16] See Columbia Broadcasting System v. United States, 316 U. S. 407 (1942); Associated Industries v. Ickes, 134 F. 2d 694 (2d Cir.), *reversed on other grounds*, 320 U. S. 707 (1943).

[17] 5 U. S. C. § 1001 *et seq.* (1952); B. F. Goodrich Co. v. Federal Trade Commission, 93 U. S. App. D. C. 50, 208 F. 2d 829 (1953).

[18] Embassy Dairy v. Camalier, 93 U. S. App. D. C. 364, 211 F. 2d 41 (1954).

[19] 211 F. 2d at 43. See, also, *West Coast Exploration Co. v. McKay*, 93 U. S. App. D. C. 307, 213 F. 2d 582 (1954), involving an attempt to compel issuance of a patent to public lands and discussing the process (related but not analogous to the one at hand) by which the court determines when the United States is a necessary party to a suit against Government officials.

[20] This distinction is well illustrated by litigation under the Bituminous Coal Act, 50 STAT. 72 (1937), 15 U. S. C. §§ 828 *et*

(Continued on following page)

We conclude that appellees' motion to dismiss should have been granted. In consequence, we do not reach either the substantive or the procedural and evidentiary questions urged on us by the parties.

The judgment of the District Court will be vacated and the case will be remanded to the District Court with directions to dismiss the complaint.

It is so ordered.

PRETTYMAN, *Circuit Judge*, dissenting: I disagree with my brethren in their disposition of this case.

In the complaint plaintiffs say that by mutual agreements, evidenced by written documents, certain Government officials and certain private parties, all acting in concert, plan to destroy plaintiffs' private business and property by acts which are beyond the power conferred by the Congress upon the executive officials involved and are also illegal because in violation of statutes. This court says plaintiffs had no standing to sue, they presented no justiciable controversy. With that I disagree.

The facts are tremendously complicated if described in detail, but they can be stated simply in a general outline which is sufficient for present purposes. The *dramatis personae* are, by groups, five in number:

1. A number of rural cooperative electric distribution companies. They buy electric power at wholesale and sell it at retail to farmers and others in rural areas principally

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seq. (1940). There an action brought by the City of Atlanta to enjoin fixing of coal prices failed for lack of standing to sue, City of Atlanta v. National Bituminous Coal Com'n, 26 F. Supp. 606 (D.C. D.C.), *affirmed*, 308 U. S. 517 (1939); but a complaint against specific coal prices brought under the review provisions of Section 6 (b) of the statute by private business interests claiming to be adversely affected was upheld. Associated Industries v. Ickes, *supra* note 16.

in Missouri. For these purposes they own and operate distribution lines, stations, etc. Presently they buy their power from the plaintiff Companies.

2. A number of federations of the foregoing cooperatives, which neither own nor operate any facilities but act advantageously in many matters on behalf of their respective member-cooperatives. These federations are called "Super-Coops."

3. A number of utility companies, privately owned and operated, which own and operate generating plants and transmission lines. They generate electric energy and transmit it over long high-voltage lines to central stations of the rural cooperatives, where they sell at wholesale. They own hundreds of miles of these transmission lines and a number of generating plants. In the complaint they say they are ready, able and willing to supply all requirements of all customers, present and potential, in these areas. We shall call them the "Companies." They are our plaintiffs.

4. The Rural Electrification Administration. This is a Government agency in the Department of Agriculture. It was created by the Rural Electrification Act [1] and has power to lend money. We shall call it the "REA."

5. The Southwestern Power Administration. This is a Government agency created under emergency war power by Executive Orders and thereunder by the Secretary of the Interior. It was authorized by statute [2] to sell the surplus energy generated at multiple-purpose reservoir projects under the control of the Department of the Army. We shall call it the "SPA."

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[1] 49 STAT. 1363 (1936), as amended, 7 U. S. C. A. §§ 901-914.

[2] Sec. 5, Flood Control Act of 1944, 58 STAT. 890, amended, 61 STAT. 501 (1947), 16 U. S. C. A. § 825s.

Five sets of contracts were attacked in the complaint. Each set involved the REA, the SPA, and a Super-Coop as parties. The set used by the court as illustrative is the set to which a Super-Coop called Northwestern (or NW) is a party. This set consisted of three contracts, one a loan contract, one a lease-option contract, and the third a power contract. These contracts were integrated by reciprocal conditions, each being dependent upon execution of the others.

In brief outline what the complaint says in regard to the illustrative contracts is this: By these contracts it was agreed that REA will lend Super-Coop money to build a generating plant and certain transmission lines; Super-Coop will then do two things, lease the lines to SPA for forty years and sell to SPA the entire output of the plant for forty years; Super-Coop will then purchase from SPA all its requirements of electric energy for forty years;[3] the price to be paid Super-Coops by SPA for the output of the plant is to be the cost (principal and interest) of financing the loan to build the plant, plus operating costs assignable to the plant, and the rental for the lease of the lines is to be the cost of financing the loan to build the lines, plus operating costs assignable to the lines; and the purchase of power back from SPA by Super-Coop on behalf of its member rural distributors will be at a rate and not involved in the loan accounting.

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[3] *E.g.*, one allegation of the complaint is that the members of Northwestern would be required "to cease purchasing electric energy from their present suppliers, including plaintiffs, and to purchase all of their requirements for electric energy from Northwestern and indirectly from SPA." Other allegations are that SPA agrees to supply NW's requirements of electric energy up to 40,000 kw; that the aggregate annual peak demand of NW members in 1949 was approximately 10,000 kw and estimated to increase to 22,000 kw by 1954; and that the capacity of the plant to be built by NW is 40,000 kw.

The results of these confederated and integrated arrangements, say plaintiffs in their complaint, will be:

1. A duplication of the existing plants and transmission lines of the Companies which are presently fully serving the needs of the several rural areas involved.

2. A transfer by contract of all this rural area business from the Companies to SPA.

3. Loans from REA secured by nothing but the plants and lines to be built with the money loaned.

4. Engagement on a major scale by SPA in the ordinary utility business of generating energy, transmitting it, and selling it at wholesale.

5. The lending of money by REA specifically for the building of plants to serve municipalities of more than 1,500 population.

While the complaint alleges the contemplated sets of contracts to be illegal in a number of respects, we need now notice only one. A principal thrust of the complaint is against concerted action, formalized by written agreement, of the Government officers and the Super-Coops. The allegation is that a number of persons—suppliers and customers—confederated to deprive plaintiffs of their business by entering into agreements whereby all the customers of plaintiffs would transfer their patronage to a potential competitor. Technically in legal terms, such an agreement and concert of action is a conspiracy.

Another concert of action described in the complaint is among the Government officers. In that respect the complaint deals with violations of the statutes conferring authority. The court considers and discusses that concert of action. But that is not the crucial allegation as to concert of action, as I read the complaint. The crucial point is the

agreement between the officials and the private parties, *i.e.*, the Super-Coops.

There are several phases to the present problem. The first phase is whether the controversy itself, as described in the complaint, is a justiciable one; this consideration is apart from the identity of the defendant parties against whom the relief is sought. A second phase is whether, if the dispute itself is justiciable, the plaintiffs are blocked by the fact that their suit is against Government officers. The court does not consider or pass upon this second phase of the problem, and I shall not do so either. Another phase is whether the Super-Coops are indispensable parties, but the court does not reach that question and I shall not.

It seems to me the allegation of damage by concerted action by the officials and the Super-Coops presents a case of damage by legal wrong. A civil action will lie upon that premise under all the rules and authorities. Disagreeing with the court, I think the plaintiffs did present a justiciable controversy, so far as the allegation of an actionable wrong is concerned. It follows that I think the court should have proceeded to consider the other point regarding justiciability, *i.e.*, whether the suit would lie against these Government officers, and then proceed to the point as to the Super-Coops being necessary parties.

It is elementary law that an individual, whether seller or customer, can do many things by himself which he cannot do in concert with others. He can fix his own prices, select his own customers or suppliers, limit his territory, and do many things, so long as he acts alone. But the law forbids such activities by agreement. Statutes make unlawful "Every contract * * * in restraint of trade"[4] and the making of any lease or contract of sale

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[4] 26 STAT. 209 (1890), 15 U. S. C. A. § 1.

"on the condition * * * that the lessee or purchaser thereof shall not use * * * the goods * * * or * * * commodities of a competitor * * * of the lessor or seller, where the effect * * * may be to substantially lessen competition."[5] We need little citation of authority to establish the proposition that a restraint upon trade which suppresses competition and accomplishes a foreclosure of an appreciable segment of a market is illegal. A few citations will suffice.[6]

To be sure, the complaint before us does not contain an allegation of jurisdiction under the antitrust laws. But that is not our problem. Our problem is whether these plaintiffs state a case which shows them to be suffering a legal wrong, apart from the identity of the defendants.

If a citizen alleges that threatened conduct will invade a private, substantive, legally protected interest of the citizen, whether the interest is protected by common law or by statute, he presents a justiciable controversy.[7] And moreover, if a citizen suffers a "legal wrong" the Administrative Procedure Act makes certain and clear that he has a standing in court.[8] I think our plaintiffs show a case

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[5] 38 STAT. 731 (1914), 15 U. S. C. A. § 14.

[6] United States v. Griffith, 334 U. S. 100, 92 L. Ed. 1236, 68 S. Ct. 941 (1948); Standard Oil Co. v. United States, 337 U. S. 293, 93 L. Ed. 1371, 69 S. Ct. 1051 (1949). And see Rashid, *Antitrust Aspects of Exclusive Dealing Arrangements*, 40 GEO. L.J. 241 (1952); 5 TOULMIN, ANTITRUST LAWS OF THE UNITED STATES §§ 10.25, 10.31 (1950).

[7] See, *e.g.*, discussion in Associated Industries v. Ickes, 134 F. 2d 694, 700-701 (2d Cir. 1943), *rev'd on other grounds*, 320 U. S. 707, 88 L. Ed. 414, 64 S. Ct. 74 (1943); Duke Power Co. v. Greenwood County, 91 F. 2d 665, 676 (4th Cir. 1937), *expressly approved*, 302 U. S. 485, 490, 82 L. Ed. 381, 58 S. Ct. 306 (1938); and in concurring opinion of Mr. Justice Frankfurter in Anti-Fascist Committee v. McGrath, 341 U. S. 123, 152, 95 L. Ed. 817, 71 S. Ct. 624 (1951).

[8] Sec. 10 (a), 60 STAT. 243 (1946), 5 U. S. C. A. § 1009 (a).

which gives them standing to sue. They allege not only that their business would be impaired by these contracts but that it would be wholly taken. Their right to do business is protected by statute from destruction by an agreement among customers and competitors, where the agreement amounts to unreasonable restraint of trade or of competition.

The court treats the contracts as merely setting up competition for the Companies. I do not see them that way. Allegedly these contracts would take all this business away from the Companies and give it to the Government. This would be complete destruction by concerted action, not a mere establishment of competition. And therein lies the vast difference between this situation and the *T. V. A.*[9] and *Alabama Power*[10] cases. In the *T. V. A.* case the problem was one of straight-out competition. The companies objected to the Government's coming into the open market to sell power in competition with private business. There was no agreement between T. V. A. and all the customers of the companies whereby the customers would stop buying the companies' power and buy all their power from the Government. The Court referred expressly to the findings of the District Court that there was no concert of action. The Court also pointed out that cooperation between two Government officials, each acting under authority of a statute, does not spell conspiracy. But that is not the case at bar.

In *Alabama Power Co. v. Ickes* Mr. Justice Sutherland, writing for the Court with meticulous care and com-

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[9] Tennessee Power Co. v. T. V. A., 306 U. S. 118, 83 L. Ed. 543, 59 S. Ct. 366 (1939).

[10] Alabama Power Co. v. Ickes, 302 U. S. 464, 82 L. Ed. 374, 58 S. Ct. 300 (1938).

pleteness, reserved from the decision the question we now have. The case presented a challenge to Government loans on the ground of the resultant competition to the Company. The Court cautioned in the very beginning of the discussion of the point, "If conspiracy or fraud or malice or coercion were involved a different case would be presented, but in their absence, plainly enough, the *mere* [underscoring Mr. Justice Sutherland's] consummation of the loans and grants will not constitute an actionable wrong." [11] And he closed the opinion by distinguishing "many other cases" on the ground that they involved "fraud, coercion, malice, conspiracy, or some other element or condition of controlling force." In the course of the opinion the Justice referred by way of illustrative example to a suppositional John Doe who operates a grocery store and objects to a loan being made to a Richard Roe who proposes to open a competing store. The lack of legal right on John's part to action against Richard is obvious. But a wholly different problem would be presented if all the customers of John agreed by contract with Richard not to buy any more groceries from John but to buy them all from Richard upon condition that Richard would build a store. Any such agreement would be clearly illegal, and John could bring a civil action to restrain it [12] or to secure triple damages on account of it.[13]

I think we should proceed to consider other phases of the jurisdictional problem presented by this case and, if these be resolved in favor of plaintiffs, proceed to the merits as the District Court did.

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[11] *Id.*, 302 U. S. at 479.

[12] 38 Stat. 737 (1914), 15 U. S. C. A. § 26.

[13] 38 Stat. 731 (1914), 15 U. S. C. A. § 15.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

THIS CAUSE came on to be heard on the original record from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, vacated, and that this cause be, and the same is hereby, remanded to the said District Court with directions to dismiss the complaint.

Dated: April 28, 1955.

PER CIRCUIT JUDGE WASHINGTON.

Separate dissenting opinion by Circuit Judge Prettyman.

APPENDIX C.

EXCERPTS FROM STATEMENT OF CLARENCE A. DAVIS, SOLICITOR OF THE DEPARTMENT OF THE INTERIOR, BEFORE THE SUBCOMMITTEE OF THE SENATE COMMITTEE ON THE JUDICIARY, JANUARY 21, 1954.*

"In the Flood Control Act of 1944, which is the act controlling a great many of the projects in the Missouri Basin, with which the committee is now particularly concerned, the Secretary of the Interior is designated as the marketing agency of power generated at flood-control dams constructed by the Corps of Army Engineers, and in this case he is given the following criteria:

> He—
>
> shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers, consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission * * *.

Preference in the sale of such energy 'shall be given to public bodies and cooperatives.' The Secretary is authorized—

> to construct or acquire only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at such projects available in wholesale quantities for sale on fair and reasonable terms to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies." (l. c. 493.)

* * * * *

"These paraphrased excerpts, I believe, are adequate to give you a broad view of such statutory power policy as has been laid down by the Congress of the United States. It is clear that all of them are based primarily upon the

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* Report of Hearings before Subcommittee of Senate Committee on the Judiciary, 83d Cong., 2d Sess., on Interior Department Power Policy, Part 2, pp. 489-503.

disposal of hydroelectric energy which is generated incidentally in connection with the construction of irrigation works or flood-control dams. * * *" (l. c. 493.)

"It is very interesting to discover that nowhere in the reports of the committees, or even in the discussion on the floors of the Houses of Congress has there ever been any adequate attempt at definition of the word 'preference' or of the scope of the preference clause. It does seem clear that the primary obligation of the Secretary of the Interior is the welfare and prompt liquidation of the project from which the energy is created. This has been so from the beginning. * * *" (l. c. 493.)

* * * * *

"* * * I should add that so far as we have been able to ascertain, the interpretation of the language of these various preference clauses has never been rendered in any judicial opinions, and consequently, the benefit of judicial interpretation is entirely lacking." (l. c. 494.)

* * * * *

"In the absence, therefore, of judicial or congressional interpretation of the preference clause, I should like to point out to the committee some of the potential problems which arise in connection with the administration of this act, in situations in which the amount of Federal power produced is not sufficient to satisfy all of the demands that are made upon the Department. * * *" (l. c. 494.)

* * * * *

"With no congressional or judicial interpretations to guide me as a lawyer, I cannot say with any degree of certainty what interpretations might be given this language if the matter resolved itself into litigation, although in all candor it should be pointed out that many of these other directives appear in the same act and as a part of the same paragraphs which contain the preference clause, and that situations may arise in which it will be difficult to give effect to one clause of the paragraph and ignore the remainder." (l. c. 495.)

* * * * *

"There is, of course, a grave constitutional question involved in the unlimited extension of the Federal Government in the power business which I shall not discuss in this statement. I might, however, call your attention to the fact that the Supreme Court of the United States, in the famous Ashwander case used these very significant words:

" 'The Government rightly conceded at the Bar, in substance, that it was without constitutional authority to acquire or dispose of such energy except as it comes into being in the operation of works constructed in the exercise of some power delegated to the United States.' " (l. c. 501.)

* * * * *

"The legal authority of the Department through the Bureau of Reclamation or the other power agencies to purchase steam power is far from clear. Nowhere in any of these power acts is there any direct authorization for the Department to engage in the purchase of steam power in the Missouri Basin, or for that matter elsewhere, except as it may be implied from various appropriations bills." (l. c. 501.)

* * * * *

"The whole question of the right to purchase steam power by the Department is shrouded in legal uncertainty. We can state positively, however, that there is no authority in the Assistant Secretary to make contracts for the direct purchase of steam energy in the Missouri Basin, and certainly no authorization to go into the brokerage business for the purchase of steam power for resale to these cooperatives. * * *" (l. c. 502.)

EXCERPTS FROM OPINION NO. 4506, DATED NOVEMBER 24, 1942, BY ROBERT H. SHIELDS, SOLICITOR OF THE DEPARTMENT OF AGRICULTURE.*

"A study of the debates in Congress and the committee hearings indicates that this provision [the central station

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* Printed Hearings, Subcommittee of Senate Committee on Agriculture Appropriations for 1951, 81st Cong., 2d Sess. 1378-9.

service provision] was inserted because of a legislative intent to exclude loans for the purpose of paralleling existing systems and thus creating competition with established utilities.

* * * * *

"* * * Practically the entire debate on the limiting clause here under discussion centered about the question of competition. It seems clear from the legislative history that the intent of the limitation was to prevent loans that would create federally-financed competition with existing utility enterprises. * * *"

EXCERPTS FROM OPINION NO. 5427, DATED NOVEMBER 3, 1948, BY W. CARROLL HUNTER, SOLICITOR OF THE DEPARTMENT OF AGRICULTURE.

"In addition, the inclusion of this limitation [the rural area provision] further stressed the interest of Congress in preventing competition between established utilities and REA borrowers." (p. 19568.)

* * * * *

"Congressional debates and committee hearings contain frequent references to the clause in question [the central station service provisions]; but, as has been noted, these discussions were generally concerned with the question of competition. * * * This distinction serves to emphasize the point that the interest of Congress, in this provision, was to prevent competition with established utilities.

* * * * *

"In effect, then, 'not receiving central station service' might be equivalent to 'not being served by an existing utility company.' " (pp. 19660-1.)

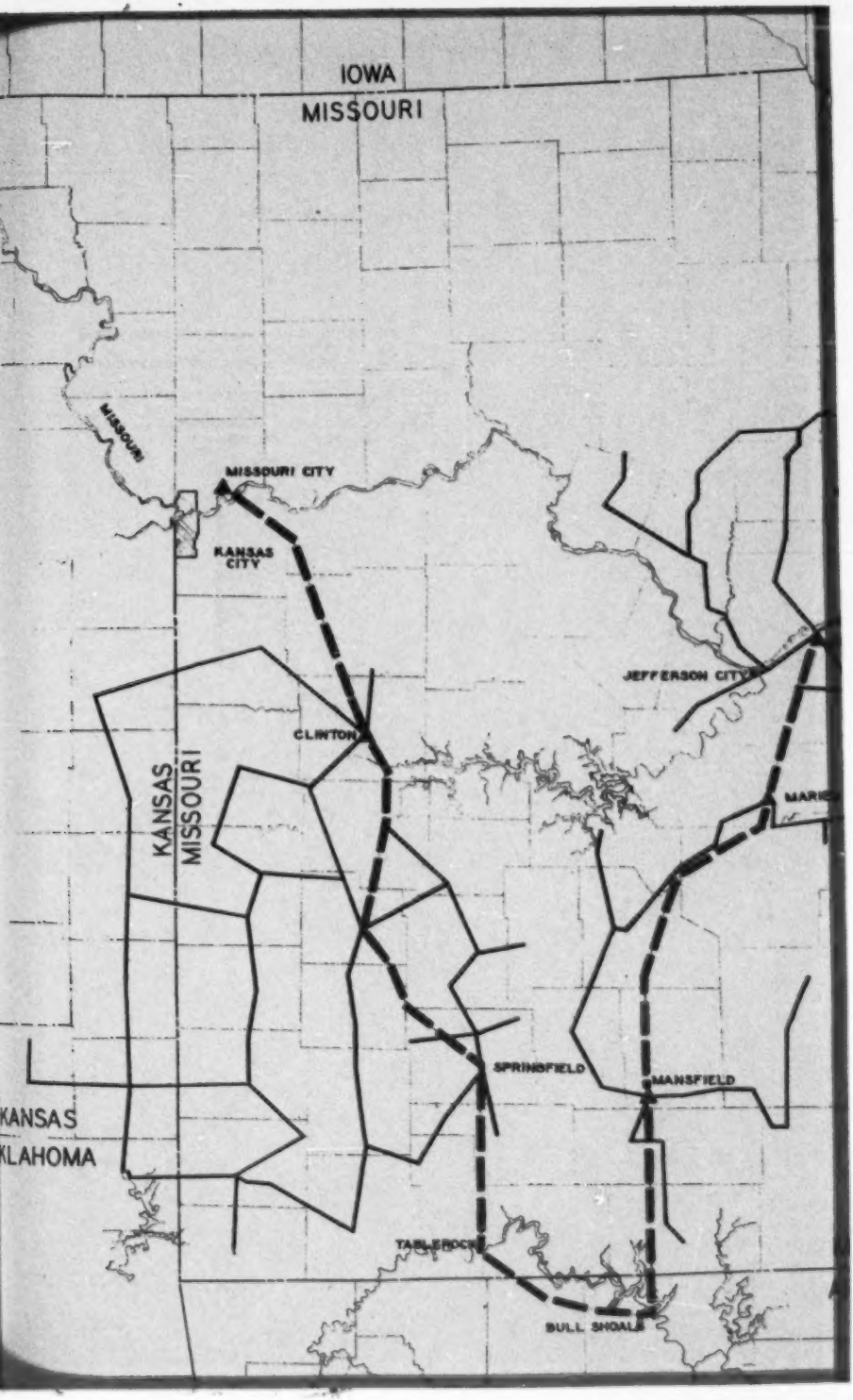
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TABLE ROCK
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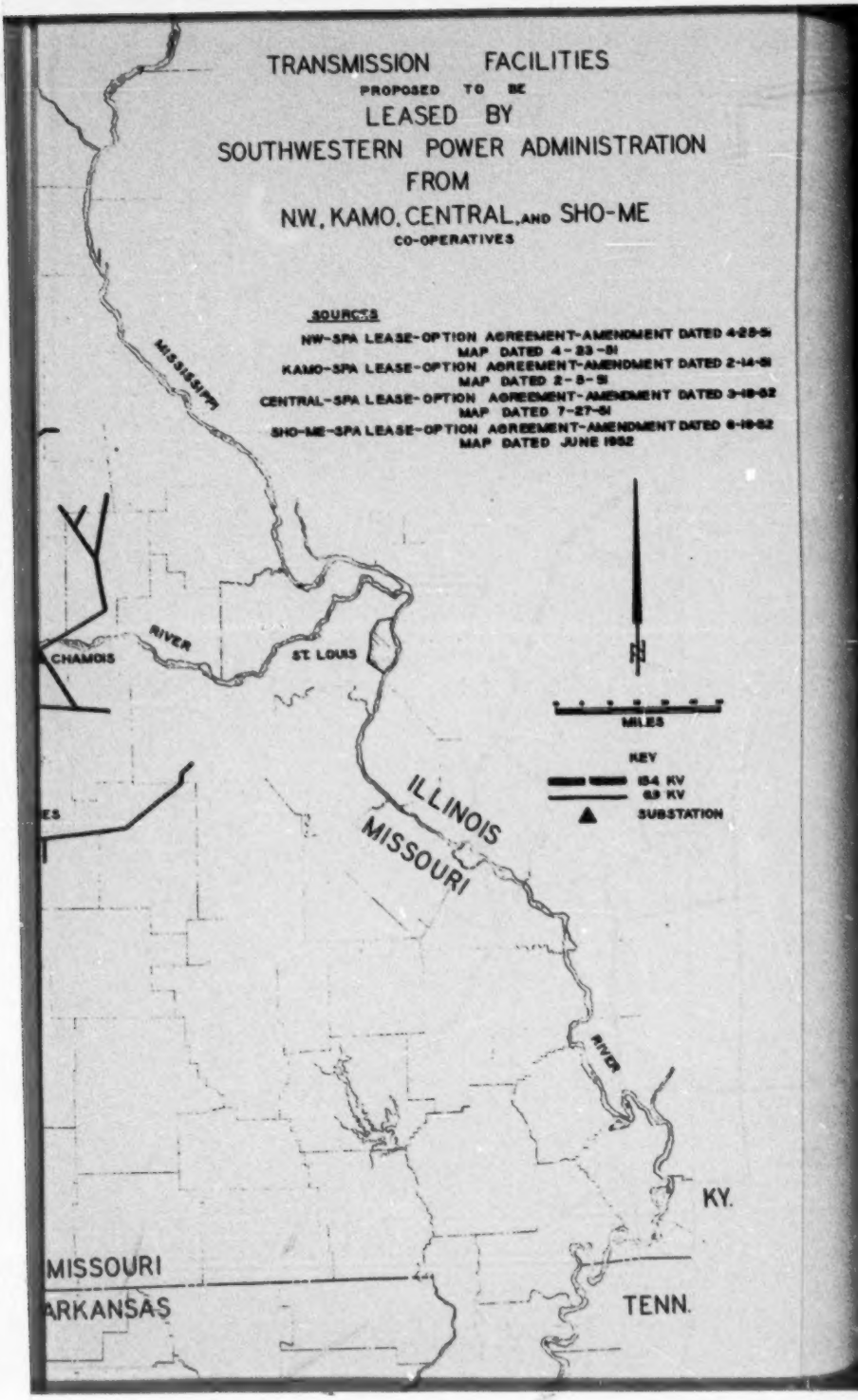
TRANSMISSION FACILITIES
PROPOSED TO BE
LEASED BY
SOUTHWESTERN POWER ADMINISTRATION
FROM
N.W., KAMO, CENTRAL, AND SHO-ME
CO-OPERATIVES
SOURCES
NW-SPA LEASE-OPTION AGREEMENT-AMENDMENT DATED 4-23-51
MAP DATED 4-23-51
KAMO-SPA LEASE-OPTION AGREEMENT-AMENDMENT DATED 2-14-51
MAP DATED 2-5-51
CENTRAL-SPA LEASE-OPTION AGREEMENT-AMENDMENT DATED 3-19-52
MAP DATED 7-27-51
SHO-ME-SPA LEASE-OPTION AGREEMENT-AMENDMENT DATED 6-19-52
MAP DATED JUNE 1952
MISSISSIPPI
RIVER
CHAMOIS
ST. LOUIS
ILLINOIS
MISSOURI
RIVER
KY.
MISSOURI
ARKANSAS
TENN.
MILES
KEY
154 KV
69 KV
SUBSTATION

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
Argument	8
A. Under established general principles, petitioners have no standing to sue	9
1. The REA loans	10
2. The SPA contracts	11
B. Special claims to standing are without merit	12
1. Allegation of conspiracy	12
2. Special statutory interest	15
3. The Administrative Procedure Act	18
4. Property rights in nonexclusive franchises	21
Conclusion	23
Appendix A	24
Appendix B	31

CITATIONS

Cases:

Alabama Power Co. v. *Ickes*, 302 U. S. 464	8, 9, 10–11, 12, 21
Connecticut Power & Light Co. v. *FPC*, 324 U. S. 515	22
Doremus v. *Board of Education*, 342 U. S. 429	17
Duke Power Co. v. *Greenwood County*, 302 U. S. 485	8, 11
Heikkila v. *Barber*, 345 U. S. 229	19
Jersey Central Power & Light Co. v. *FPC*, 319 U. S. 61	22
Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U. S. 123	12

350090—55——1

Cases—Continued — Page

Massachusetts v. *Mellon*, 262 U. S. 447 — 17
Mayo v. *United States*, 319 U. S. 441 — 22
Perkins v. *Lukens Steel Co.*, 310 U. S. 113 — 14, 18
Public Utilities Commission v. *Attleboro Co.*, 273 U. S. 83 — 22
Railroad Company v. *Ellerman*, 105 U. S. 166 — 11
Stark v. *Wickard*, 321 U. S. 288 — 17
Tennessee Power Co. v. *T. V. A.*, 306 U. S. 118 — 8, 9, 11–12, 21, 22
Wong Yang Sung v. *McGrath*, 339 U. S. 33 — 19

Statutes:

Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001, *et seq.*:
Sec. 2 (g) — 20, 28
Sec. 10 — 19, 20, 28
Continuing Fund Statute, 63 Stat. 767, as amended, 16 U. S. C. 825s–1 — 27
Flood Control Act of 1944, as amended, Sec. 5, 58 Stat. 887, 890, 61 Stat. 501, 16 U. S. C. 825s — 15, 22, 26
Public Works Appropriation Act, 1956 (Pub. L. No. 163, 84th Cong., 1st Sess.), 69 Stat. 354, 356 — 20
Rural Electrification Act, 49 Stat. 1363, as amended, 7 U. S. C. 901, *et seq.*:
Sec. 4 — 4
Sec. 13 — 15, 25

Miscellaneous:

H. Rep. No. 747, 84th Cong., 1st Sess — 31
S. Rep. No. 700, 84th Cong., 1st Sess — 33
S. Doc. No. 248, 79th Cong., 2d Sess., p. 230 — 21

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 370

KANSAS CITY POWER & LIGHT COMPANY, ET AL., PETITIONERS

v.

DOUGLAS MCKAY, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The memorandum opinions of the district court before trial (R. 105–107, 109–110) are not reported. The opinion of the district court after trial (R. 126–150) is reported at 115 F. Supp. 402. The majority and dissenting opinions in the court of appeals (Pet. App. B., 42–65) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1955 (R. 679). A petition for rehearing was denied on June 3, 1955 (R. 711). The petition for a writ of certiorari was filed on September 1, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Whether private electric utility companies holding nonexclusive franchises have standing to challenge, on the ground that the challenged action will result in their loss of business—

(a) the legality under the Rural Electrification Act of loan contracts made by the Rural Electrification Administration with federated rural cooperatives to enable the borrowers to construct electric generating and transmission facilities, or

(b) the legality under Section 5 of the Flood Control Act and the Continuing Fund Statute of contracts made by the Southwestern Power Administrator, marketing agent for the Secretary of the Interior for the southwestern power area, with federated rural cooperatives for the purchase and sale of power and for the use of their transmission facilities.[1]

---

[1] The standing of the petitioners to maintain the suit was the only issue decided by the court below. If the petition is granted, the Government will support the judgment in its favor on the additional grounds (1) that this suit to invalidate numerous government contracts is an unconsented suit

STATUTES INVOLVED

The pertinent portions of the Rural Electrification Act of 1936 (7 U. S. C. 904, 913), the Flood Control Act of 1944 (16 U. S. C. 825s), the Continuing Fund Statute (16 U. S. C. 825s–1), and the Administrative Procedure Act (5 U. S. C. 1001, 1009) are set forth in Appendix A, *infra*, pp. 24–30.

STATEMENT

This suit was brought by several power companies in October 1950 to enjoin the Secretary of the Interior, the Secretary of Agriculture, the Secretary of the Treasury, the Administrator of the Southwestern Power Administration, and the Administrator of the Rural Electrification Administration, from carrying out obligations under various contracts entered into by the United States, acting through the Rural Electrification Administration (REA) and the Southwestern Power Administration (SPA), with five federated rural cooperatives (R. 151–153).

Each petitioner is engaged, as a public utility and owner of nonexclusive franchises, in the business of supplying, at wholesale and retail, electric power and energy to the public in its service territory. The service territories are

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against the United States, (2) that the United States and the federated cooperatives, as the only parties to the contracts under attack, are indispensable parties, (3) that the challenged contracts by both REA and SPA were in all respects within statutory authorization, and (4) that the statutory authorization was constitutionally conferred.

located principally in the State of Missouri but extend into eastern Kansas and northern Arkansas. The federated cooperatives are independent corporations, organized under the laws of their respective States (R. 155–159). Their members consist of 33 rural cooperatives operating their own electric distribution systems constructed with the proceeds of REA loans, aggregating $82,000,000, to furnish electric energy to persons in rural areas not receiving central station service (R. 155–158, 163).

The two-fold purpose of the action was (1) to prevent the REA from lending funds of the United States to the federated cooperatives to construct generating and transmission facilities and (2) to prevent SPA from using federal funds to purchase power and to lease transmission facilities in accordance with the contracts between the Government and the federated cooperatives. The claim was that the REA contracts exceeded statutory authority and that the SPA contracts exceeded both statutory and constitutional authority (R. 151–153, 159–161, 510, 513, 530, 531, 571, 585, 597, 598).

Three basic types of contracts are involved: (1) loan contracts with REA, (2) power contracts with SPA, and (3) lease contracts with SPA. Contracts between the federated cooperatives and REA provide for loans to the federated cooperatives in the aggregate amount of $54,000,000 for the construction of thermal electric

generating plants and various high voltage transmission lines linking these plants and the distribution systems of the member cooperatives in Missouri, Kansas and Oklahoma with the Bull Shoals reservoir in Arkansas, a federal hydroelectric project[2] (R. 159–161, 163).

Contracts between the federated cooperatives and SPA provide for the sale by the cooperatives of power to SPA and for the purchase by them of power from SPA (R. 173, 175, 176, 177, 178). Separate contracts provide for the use by SPA of the transmission facilities of the federated cooperatives in supplying the cooperatives and, to the extent of excess incidental capacity, other SPA customers (R. 169, 171, 172). The SPA contracts are "expressly conditioned and contingent on the Congress making the necessary appropriations to enable the Government [SPA] to carry out the provisions of the agreement" (R. 181, 189, 590, 591).

[2] Except for those pertaining to some relatively minor transmission lines in Kansas, the loans which the complaint sought to enjoin (R. 2, 35–47) have all been made, and the electric facilities have all been constructed. Petitioners moved for a preliminary injunction early in the proceedings, but never brought the motion on for hearing.

A map (Def. Ex. 101) showing the electric facilities contemplated and their relationship to the Government's hydroelectric project at Bull Shoals is included in the record. The map also shows two major transmission lines, constituting an integral part of the federated cooperatives' systems, which were constructed by the United States, through SPA, for its own account with funds specifically appropriated for this purpose by Congress (R. 408–409, Exhibit 101).

Petitioners contended in their complaint that the electric facilities to be constructed with the REA loans will duplicate existing private facilities and that the arrangements of the federated cooperatives with SPA for the use of transmission facilities and for the purchase and sale of electric power and energy will result in substantial loss of business to them (R. 47). The gravamen of the complaint was not, as petitioners now contend (Pet. pp. 8, 12), a conspiracy to injure petitioners, but a conspiracy of respondents (with others) to exceed their statutory authority for the purposes of enabling SPA to sell "large quantities of electric energy in destructive federally subsidized competition with plaintiffs" and of enabling the federated cooperatives "to duplicate facilities of, and to compete with, privately owned utilities in rural areas" in which the private utilities were providing service (Complaint, R. 35–36).

Respondents' motion to dismiss on the ground, among others, that petitioners did not have proper standing to bring the action (R. 104) was overruled (R. 108). Thereafter, the district court ordered a separate trial "on the issue of the legality or illegality" of the contracts apart from any question of conspiracy (R. 112, 124–125). At the conclusion of this separate trial, the district court found that the REA loans in question were made to finance construction of electric generating and transmission facilities to provide

service for persons in rural areas within the contemplation of the Rural Electrification Act (R. 163–164, 134–135, 137, 189). It found that the SPA contracts permit the integration of thermal and hydro energy for most efficient operation, and will tend to accomplish maximum utilization of the federal reservoir projects in the southwestern power area in accordance with statutory preferences (R. 185–186). It concluded that the challenged contracts were in all respects within the statutory and constitutional authority of REA and SPA (R. 189–190).

On the basis of these findings and conclusions, the district court entered an interlocutory decree adjudging that the contracts were valid (R. 191). Petitioners made no request for a finding of conspiracy, which was not at issue in the separate trial (R. 195–218). Apparently abandoning the charge of conspiracy, petitioners moved for the entry of final judgment, stating that all relevant issues had been determined and that they did not wish to present evidence on any other issue (R. 193). The district court thereupon entered its final judgment dismissing the action (R. 194).

Directing its attention first to the nature of petitioners' interest, the court of appeals held that controlling decisions of this Court "dealing with other electric power contracts of the Federal Government, establish that an interest of this kind is not sufficient to enable them to sue to enjoin execution of the power contracts and pro-

359090—55——2

gram of the Government," relying on *Alabama Power Co.* v. *Ickes,* 302 U. S. 464; *Duke Power Co.* v. *Greenwood County,* 302 U. S. 485; and *Tennessee Power Co.* v. *T. V. A.,* 306 U. S. 118 (Pet. App. B, pp. 45–46).

The court found nothing to distinguish the present situation, pointing out that the "statutory scheme now before us clearly contemplates Congressional, rather than judicial, review of the governmental activities here in question, all of which are non-regulatory and which include disposal of surplus electric power turned over to the SPA by the Department of the Army." The continuance of the activities in question, it held, is "subject to review by Congress acting each year on the appropriations sought by the defendants" (Pet. App. B, pp. 51–52). The court of appeals concluded that respondents' motion to dismiss should have been granted. Accordingly, it vacated the judgment of the district court in favor of the Government on the merits and remanded the case with directions to dismiss the complaint. Judge Prettyman dissented.

ARGUMENT

The activities of REA in making loans for the construction of electric generating and transmission facilities and the activities of SPA in making contracts for the use of these facilities and for the purchase and sale of power are virtually identical with the activities which private

electric utility companies sought unsuccessfully to challenge in *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, and *Tennessee Power Co.* v. *T. V. A.,* 306 U. S. 118. Petitioners' standing to sue would thus clearly appear to be foreclosed in the absence of differentiating circumstances. But the fact is that petitioners stand in no different relation to the claimed unauthorized action than did the plaintiffs in those cases. Although petitioners purport to rely on distinguishing factors, their complaint reveals that in reality they seek a reconsideration of those decisions.

A. UNDER ESTABLISHED GENERAL PRINCIPLES, PETITIONERS HAVE NO STANDING TO SUE

Petitioners assert the right to maintain this action as citizens and property owners lawfully engaged in business, as the owners of real and personal property and franchises, as statutory beneficiaries under the Rural Electrification Act and Section 5 of the Flood Control Act, and as persons "suffering legal wrong" and "adversely affected or aggrieved" within the meaning of the Administrative Procedure Act (R. 7–8). The essence of the complaint is that the challenged contracts exceed the statutory authority of REA and SPA and that the utility companies will suffer business losses as a result of the electric facilities to be provided by the REA loans and of the operations of SPA under its lease and power contracts (R. 105–107).

The power companies, as holders of nonexclusive franchises, do not and cannot charge that the conduct they seek to prevent would be unlawful if performed by private parties and that it is sought to be justified by resort to the federal statutes involved. They urge, instead, that the competition is not authorized by the federal statutes. It is clear in these circumstances, since the power companies have no right to be free from competition, that no legal right is being invaded and that they have no standing to sue unless such a right has been conferred by statute.

1. *The REA Loans.* Petitioners' lack of standing as competitors and holders of nonexclusive franchises to challenge the loans by REA which permitted the federated cooperatives to construct generating and transmission facilities is established by *Alabama Power Co.* v. *Ickes, supra.* There, as here, the plaintiff's case came "down to the contention that consummation of the loan-and-grant agreements should be enjoined on the sole and detached ground that the administrator lacks constitutional and statutory authority to make them, and that the resulting moneys, which the municipalities [here, cooperatives] have clear authority to take, will be used by the municipalities in lawful, albeit destructive, competition with petitioner." 302 U. S. at 478. The Court held that "no action can be maintained" based on an allegation of pecuniary injury and unauthorized conduct in the absence of the breach of a legal

duty *owed to the plaintiff*. 302 U. S. at 479. The opinion cited as "directly in point" (p. 481) *Railroad Company* v. *Ellerman*, 105 U. S. 166, in which the operator of public wharves sought to enjoin a railroad from leasing its wharf for uses beyond both legislative authorization and its corporate powers. In denying relief, the *Ellerman* case had similarly held (pp. 173–174) that plaintiff's allegation "that the railroad company is acting beyond the warrant of the law" was of no avail because the railroad's "violation of its charter does not of itself injuriously affect any of his rights. The company is not shown to owe him any duty which it has not performed."

The holding in the *Alabama Power* case was reiterated in the companion case of *Duke Power Co.* v. *Greenwood County*, 302 U. S. 485, where "petitioners' standing to maintain the suit" was denied because "even though the administrator were without authority to make the proposed loan and grant, no legal right of petitioners was thereby invaded." (P. 490.)

2. *The SPA Contracts.* Petitioners' standing to challenge the SPA contracts has no better footing. This aspect of the case presents virtually the same question decided in *Tennessee Power Co.* v. *T. V. A., supra,* and is controlled by that decision. In that case, the grievance was that activities of T. V. A. would result in electric systems competing with those of numerous electric power companies and inflict substantial damages upon

them. This Court held that no one could challenge the validity of a statute or of action taken thereunder (306 U. S. 118, 137–138) "unless the right invaded is a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." By these tests, electric power companies were held to have no standing to sue to restrain allegedly wrongful activities of T. V. A. founded on a statute whose constitutionality was challenged. For a recent restatement of the governing principles, see Mr. Justice Frankfurter's concurring opinion in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 152, 159.

B. SPECIAL CLAIMS TO STANDING ARE WITHOUT MERIT

Notwithstanding the adverse determinations of this Court in virtually identical circumstances, petitioners claim standing on four special grounds—(1) an allegation of conspiracy, (2) a special interest under the statutes they allege are being violated, (3) a right to judicial review under the Administrative Procedure Act, and (4) invasion of their property rights in nonexclusive franchises. None of these claims is valid.

1. *Allegation of Conspiracy.* Apparently to avoid the force of *Alabama Power Co.* v. *Ickes* and *Tennessee Power Co.* v. *T. V. A.*, petitioners assert that the gist of their complaint is "a conspiracy to destroy the existing and established

business of each plaintiff in a large area of its service territory" and "not the setting up of competition" (Pet. 8, and footnote). We submit that (a) a legally sufficient cause of conspiracy has not been alleged in the complaint, and (b) if alleged, it has been affirmatively waived.

(a) The complaint reveals that the gravamen of petitioners' alleged injury is competition. To the extent that conspiracy is alleged, it is a conspiracy to exceed statutory authority, not a tortious conspiracy calculated to destroy their business. In its only reference to conspiracy the complaint alleges that respondents with others "combined, confederated, conspired and acted in concert to formulate a plan unlawfully" to misuse their statutory authority to enable SPA to sell "large quantities of electric energy in destructive federally subsidized competition with plaintiffs" and to enable federated cooperatives "through unlawful use of REA funds to duplicate facilities of, and to compete with, privately owned utilities in rural areas where such privately owned utilities were and are providing" service (R. 35–36).

The theme of competition resulting from action exceeding statutory authority is repeated throughout the complaint (R. 47, 48, 49, 50, 51, 52). The theory of a conspiracy to exceed statutory authority, rather than to destroy petitioners' business, is reiterated in their submission of issues for the separate trial (R. 124). As the

court below observed, "It is indisputable that the essence of plaintiffs' complaint is the competition which they will suffer if the Government's contracts are carried out" (Pet. App. B, p. 45). Characterizing this claim of unauthorized action by two government agencies as a "conspiracy" does not confer standing to sue. Cf. *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 120, 125.

(b) In any event, petitioners have effectively waived any right to rely on an allegation of conspiracy. As noted in our Statement (*supra*, pp. 6–7), a separate trial was had in the district court "on the issue of the legality or illegality" of the several contracts between REA or SPA and the federated cooperatives (R. 112). Petitioners' contention that the contracts were illegal as part of a conspiracy among respondents to exceed their authority was ruled "not within the scope of the issue to be determined in the separate trial," and no evidence was admissible at the separate trial to prove or disprove this contention (R. 124–125). Accordingly, no findings with respect to conspiracy were made by the court (R. 151–189), or requested by petitioners (R. 195–218), at the conclusion of the separate trial, and an interlocutory judgment that the contracts were within the statutory authority of respondents was entered (R. 191).

Although supplemental findings of fact on issues not dealt with in the separate trial were

thereafter made upon stipulation (R. 192), petitioners did not request a trial on the issue of conspiracy. On the contrary, they moved for the entry of a final judgment stating that determination of the issues previously made "is dispositive of all the relevant issues in the cause and permits the entry of a final judgment" (R. 193). They further stated that they "do not wish to present any additional evidence on any other issue" (R. 193).

In these circumstances, petitioners can hardly rely upon the abandoned allegation of conspiracy to buttress their claim of standing to sue.

2. *Special Statutory Interest.* The power companies' claim to a special statutory interest under Section 5 of the Flood Control Act and under the Rural Electrification Act is plainly refuted by the language and purpose of the two acts. Electric utility companies were not the intended beneficiaries of the acts. The Rural Electrification Act (*infra,* pp. 24–26) was enacted to bring electric power and energy to persons in rural areas not receiving service from existing sources of supply. The purpose of Section 5 of the Flood Control Act (*infra,* pp. 26–27) was to provide for the disposition of surplus federal hydroelectric power and energy.

The statutes do not in terms confer any rights upon the power companies, although they may qualify as recipients of REA loans or as purchasers of

359090—55——3

power marketed by SPA—subject, in each case, to the preference accorded to cooperatives and public bodies. The Acts do not regulate or impose restraints upon the manner in which the petitioning power companies conduct their businesses. Neither Act contains any provision whatever for holding hearings, issuing orders, permitting intervention, or judicial review; nor is there any reference to "persons aggrieved", "persons whose interests may be adversely affected", or any of the other terms or provisions regularly associated with statutes granting a statutory right to sue.

Moreover, the power companies' claim to standing is not based upon the denial to them of statutory rights or benefits, but upon the grant of benefits to others in claimed violation of statutory authority. Their asserted special statutory interest, therefore, is not as beneficiaries of an affirmative grant, but as beneficiaries of an implied prohibition.

Thus, it remains clear that petitioners' suit is defeated by the settled rule already discussed (*supra,* pp. 9–12) that a claim of injurious competition, otherwise lawful, confers no standing to sue merely because it is asserted to result from action by Government officials exceeding their statutory authority. To hold that the limits of statutory authority automatically create a special statutory interest which will support a suit to

prevent governmental action beyond those limits is to reject the well-established principles requiring, as a prerequisite to suit, interference with a legal right recognized at common law or explicitly established by Congress. Such a legal right is not to be lightly implied. As this Court stated in *Stark* v. *Wickard,* 321 U. S. 288:

> To reach the dignity of a legal right in the strict sense, it must appear from the nature and character of the legislation that Congress intended to create a statutory privilege protected by judicial remedies [p. 306].

Petitioners' attempt to predicate standing merely on the allegation that respondents have exceeded their authority would, if accepted, confer a right on any taxpayer or citizen to test in court the validity of governmental action, contrary to the settled principles of cases like *Massachusetts* v. *Mellon,* 262 U. S. 447; see also *Doremus* v. *Board of Education,* 342 U. S. 429.

To the extent that the statutes here in question set forth the circumstances in which loans may be made and the arrangements which may be made for the disposal of electric energy, they merely provide "guide posts" by which the Government's agents are to proceed. They "create duties to the Government alone * * *. The Secretary's responsibility is to superior executive and legislative authority. Respondents

have no standing in court to enforce that responsibility or to represent the public's interest in the Secretary's compliance with the Act." *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127, 129.

Sole responsibility to superior executive and legislative authority in the present case is emphasized by the fact that the administrative programs have been under virtually continuous congressional review because they entail the expenditure of large sums of public funds requiring annual appropriations by Congress. As the court below pointed out, "The continuance of defendants' activities here complained of is therefore subject to review by Congress acting each year on the appropriations sought by the defendants" (Pet. App. B, p. 52).

It is clear, therefore, that in these statutes Congress did not create any statutory rights which would provide a basis for this suit.

3. *The Administrative Procedure Act.* Petitioners' reliance upon the Administrative Procedure Act as creating capacity to sue is similarly misconceived because they are not within the scope of its provisions. The court below did not hold, as petitioners assert (Pet. 18), that the Administrative Procedure Act did not increase the availability of judicial review of agency action, or that the right of judicial review depends upon the express grant of such a right, or that

the Procedure Act was to be narrowly construed. The court specifically stated a contrary view,[3] but held that in the circumstances of this case there was "no basis for recognizing plaintiffs' standing to bring this action under the judicial review provisions of the Administrative Procedure Act" (Pet. App. B, p. 56).

Section 10 (a) of the Administrative Procedure Act (5 U. S. C. 1009) provides:

> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) Any agency suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

As we have already seen (*supra*, pp. 15–16), the executive action here in question does not involve any regulation of petitioners, the imposition of obligation or sanctions, the denial of any rights or relief, or the determination of any status. It is doubtful therefore that the making of contracts for loans, for the use of electric facilities, and for the purchase and sale of power constitutes

[3] Expressly mindful of the statements by this Court of the statute's remedial purposes in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 41, and *Heikkila* v. *Barber*, 345 U. S. 229, the court stated that "we would certainly be prepared to hold in an appropriate case that one who complains of administrative action may find a remedy under the Act beyond the strict scope of judicial review recognized prior to its adoption" (Pet. App. B, p. 56).

"agency action" within the meaning of Section 2 (g) of the Administrative Procedure Act (Appendix, *infra*, p. 28).

It is decisive here, in any event, that the statutes involved do not in terms create any substantive rights or rights of review or provide for or contemplate conventional hearings or procedures at the administrative level. The executive action taken under them is subject to annual review by Congress in connection with annual appropriations to provide funds for loans, for the use of electric facilities and for the purchase of power.[4] This statutory scheme strongly suggests that, if "agency action" is involved, it falls within the express exception to Section 10 for "agency action * * * by law committed to agency discretion."

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[4] In this connection, the following statement in the opinion of the court below with respect to SPA is particularly pertinent (Pet. App. B, p. 51): "With the evident purpose of nailing down its control over the expenditure of this continuing fund in unmistakable terms, Congress amended the Act in 1951 to provide that 'expenditures from this fund to cover such costs in connection with the purchase of electric power and energy and rentals for the use of facilities are to be made only in such amounts *as may be approved annually in the appropriation Acts.*' (Italics added.) 65 Stat. 249, 16 U. S. C. § 825s–1 (1952)."

For an illustration of the manner in which this control has been exercised, see the excerpt set forth in Appendix B, *infra*, pp. 31–33, from the House Report relating to the Public Works Appropriation Act, 1956 (Pub. Law 163, 84th Cong., 1st Sess., 69 Stat. 354, 356).

But even if review is not precluded by the exception, petitioners are not persons "suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action *within the meaning of any relevant statute.*" Certainly, the Administrative Procedure Act did not change the concept of "legal wrong" as expounded in *Alabama Power Co.* v. *Ickes* and *Tennessee Power Co.* v. *T. V. A., supra.*[5] And since petitioners are not statutory beneficiaries and are not subject to any administrative action, either affirmative or negative, under either the Rural Electrification Act or the Flood Control statutes, they cannot be "adversely affected or aggrieved * * * within the meaning of any relevant statute."

4. *Property Rights in Nonexclusive Franchises.* Petitioners' claim to standing to protect a property right in nonexclusive franchises because none of respondents has any franchise to engage in the electric utility business (Pet. 8, 29–30, R. 113) is obviously without merit. It is clearly irrelevant to their standing to enjoin the REA loans, since it is nowhere contended that a franchise is required to make loans for the construction of electric facilities. And it has no greater force in

[5] Commenting on Section 10 (a) in the bill which was enacted, the Attorney General indicated to the Senate Committee on the Judiciary that the rule of *Alabama Power Co.* v. *Ickes*, to which he specifically referred, was not being changed. S. Doc. No. 248, 79th Cong., 2d Sess., p. 230.

relation to the SPA contracts. In *Tennessee Power Co.* v. *T. V. A., supra,* the Court rejected this very argument. The complaining utilities had urged that the statutory requirement of a certificate conferred upon them an enforceable right to attack the program of T. V. A., because the latter had no certificate. Holding that the argument lacked merit, the Court pointed out that the regulation of competition between utilities "is a matter of state policy * * * subject to alteration at the will of the legislature", and that a legislative "declaration of a specific policy creates no vested right to its maintenance in utilities then engaged in the business" (p. 141).

Moreover, it does not appear that the states here involved have ever attempted to require a certificate of SPA even assuming that they could assert jurisdiction over a federal agency engaged in the interstate sale of electric energy for resale.[6] See *Mayo* v. *United States,* 319 U. S. 441; *Public Utilities Commission* v. *Attleboro Co.,* 273 U. S. 83; *Connecticut Light & Power Co.* v. *FPC,* 324 U. S. 515, 525–527; *Jersey Central Power & Light Co.* v. *FPC,* 319 U. S. 61. SPA has for some time owned and operated facilities in Missouri, Arkansas and Oklahoma, without a certificate. Its right to do so has not been questioned by any state regulatory agency.

[6] Section 5 of the Flood Control Act (*infra,* p. 26) provides for confirmation and approval of SPA rate schedules by the Federal Power Commission.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1955.

APPENDIX A

Sections 4 and 13 of the Rural Electrification Act of 1936, 49 Stat. 1365, 1367, as amended (7 U. S. C. 904, 913), provide as follows:

> Section 4. The Administrator is authorized and empowered, from the sums hereinbefore authorized, to make loans for rural electrification to persons, corporations, States, Territories, and subdivisions and agencies thereof, municipalities, peoples' utility districts and cooperative, nonprofit, or limited-dividend associations organized under the laws of any State or Territory of the United States, for the purpose of financing the construction and operation of generating plants, electric transmission and distribution lines or systems for the furnishing of electric energy to persons in rural areas who are not receiving central station service, and loans, from funds available under the provisions of sections 3 (d) and 3 (e) but without regard to the 10 per centum limitation therein contained, to cooperative associations and municipalities for the purpose of enabling said cooperative associations, and municipalities to the extent that such indebtedness was incurred with respect to electric transmission and distribution lines or systems or portions thereof serving persons in rural areas, to discharge or refinance long-term debts owed by them to the Tennessee Valley Authority on account of loans made or credit extended under the terms of the Tennessee Valley Authority Act of

1933, as amended: *Provided,* That the Administrator, in making such loans, shall give preference to States, Territories, and subdivisions and agencies thereof, municipalities, peoples' utility districts, and cooperative, nonprofit, or limited-dividend associations, the projects of which comply with the requirements of this Act. Such loans shall be on such terms and conditions relating to the expenditure of the moneys loaned and the security therefor as the Administrator shall determine and may be made payable in whole or in part out of the income: *Provided further,* That all such loans shall be self-liquidating within a period of not to exceed thirty-five years, and shall bear interest at the rate of 2 per centum per annum; interest rates on the unmatured and unpaid balance of any loans made pursuant to this section prior to [September 21, 1944], shall be adjusted to 2 per centum per annum, and the maturity date of any such loans may be readjusted to occur at a date not beyond thirty-five years from the date of such loan: *And provided further,* That no loan for the construction, operation, or enlargement of any generating plant shall be made unless the consent of the State authority having jurisdiction in the premises is first obtained. Loans under this section and section 5 shall not be made unless the Administrator finds and certifies that in his judgment the security therefor is reasonably adequate and such loan will be repaid within the time agreed.

* * * * *

Section 13. As used in this Act the term "rural area" shall be deemed to mean any area of the United States not included

within the boundaries of any city, village, or borough having a population in excess of fifteen hundred inhabitants, and such term shall be deemed to include both the farm and nonfarm population thereof; the term "farm" shall be deemed to mean a farm as defined in the publications of the Bureau of the Census; the term "person" shall be deemed to mean any natural person, firm, corporation, or association; the term "Territory" shall be deemed to include any insular possession of the United States.

Section 5 of the Flood Control Act of 1944, 58 Stat. 890, as amended, 61 Stat. 501 (16 U. S. C. 825s), provides as follows:

> Electric power and energy generated at reservoir projects under the control of the Department of the Army and in the opinion of the Secretary of the Army not required in the operation of such projects shall be delivered to the Secretary of the Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and

energy shall be given to public bodies and cooperatives. The Secretary of the Interior is authorized, from funds to be appropriated by the Congress, to construct or acquire, by purchase or other agreement, only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives, and privately owned companies. All moneys received from such sales shall be deposited in the Treasury of the United States as miscellaneous receipts.

The Continuing Fund Statute, 63 Stat. 767, as amended, 65 Stat. 249 (16 U. S. C. 825s–1):

All receipts from the transmission and sale of electric power and energy under the provisions of section 5 of the Flood Control Act of December 22, 1944 (16 U. S. C. 825s), generated or purchased in the southwestern power area, shall be covered into the Treasury of the United States as miscellaneous receipts, except that the Treasury shall set up and maintain from such receipts a continuing fund of $300,000, including the sum of $100,000 in the continuing fund established under the Administrator of the Southwestern Power Administration in the First Supplemental National Defense Appropriation Act, 1944 (57 Stat. 621), which shall be transferred to the fund hereby established; and said fund of $300,000 shall be placed to the credit of the Secretary and shall be subject to check by him to defray emergency expenses necessary to insure continuity of

electric service and continuous operation of the facilities, and to cover all costs in connection with the purchase of electric power and energy and rentals for the use of facilities for the transmission and distribution of electric power and energy to public bodies, cooperatives, and privately owned companies: *Provided,* That expenditures from this fund to cover such costs in connection with the purchase of electric power and energy and rentals for the use of facilities are to be made only in such amounts as may be approved annually in appropriation Acts.

Section 2 (g) of the Administrative Procedure Act, 60 Stat. 237 (5 U. S. C. 1001 (g)) provides:

> "Agency proceeding" means any agency process as defined in subsections (c), (d), and (e) of this section. "Agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

Section 10 of the Administrative Procedure Act, 60 Stat. 243 (5 U. S. C. 1009), provides as follows:

> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
>
> (b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter

in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent juridiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court)

is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

APPENDIX B

The Report (H. Rept. No. 747, 84th Cong., 1st Sess.), to accompany H. R. 6766 which subsequently became the Public Works Appropriation Act, 1956, contains the following statement (pp. 5–6):

> *Continuing Fund.*—The continuing fund language has been inserted in the bill in the same manner in which it last appeared in the appropriation bill for the Department of the Interior for the fiscal year 1953. It provides that the SPA shall have authority to use power sales revenues, subject to an annual limitation placed in the appropriation bill, to pay for emergency expenditures, purchase of electric power and energy, and rentals for the use of transmission facilities. This action makes it possible to reactivate valid and legal contracts which certain G and T (Generating and Transmission) cooperatives have with SPA. These contracts at their inception were examined by the Congress and funds were available to carry them out thru the Continuing Fund for fiscal years 1950 thru 1953.
>
> The contracts in question have been tested in the courts. Ten private utility companies filed suit, attacking the legality of the contracts, in the United States District Court for the District of Columbia. The District Court handed down an opinion on June 17, 1953, upholding the legality of the contracts. The companies appealed this decision. The Court of Appeals for the District of Columbia on April 28, 1955,

held that the companies had no standing to sue and directed the District Court to dismiss the companies' suit.

The G. and T. cooperatives originally borrowed approximately $70,000,000 from the Rural Electrification Administration for construction of system facilities on the security of their contracts with the Southwestern Power Administration. Operation of these contracts was suspended during the past two years because of action of the Congress in withholding the use of the continuing fund to implement them. This action placed the G. and T. cooperatives in a precarious financial situation for which relief has been sought through negotiations with private utilities in the area looking to integration of the G. and T. systems with the systems of the companies. These negotiations have not as yet resulted in contracts which would provide the G. and T.'s with necessary income from their several power plants and facilities in order to retire the REA loans.

In reactivating the contracts with the G. and T. cooperatives, the Department of the Interior is instructed to delete any provisions providing for the option to purchase G. and T. transmission lines or other facilities by the Southwestern Power Administration. The contracts are also to provide: (1) that the G. and T. cooperatives will operate and maintain their own transmission systems under lease to the SPA: (2) that the SPA and the G. and T. cooperatives will settle accounts for power purchased and sold on the basis of net-balances as is done under existing contracts to which SPA and private utilities are parties; and (3) that power and energy will be delivered

to the load centers of all G. and T. contracting systems at the basic SPA rate.

The Department is also instructed to provide for the recapture for the use of preference customers all power and energy to which they are entitled under the provision of section 5 of the Flood Control Act of 1944, and to negotiate as soon as possible a settlement with each contracting G. and T. cooperative effective as of the date of the passage of the bill.

* * * * *

See, also, the related report of the Senate Committee on Appropriations (S. Rept. No. 700, 84th Cong., 1st Sess.), pages 4 through 5.

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[redacted]

TABLE OF CONTENTS.

Amendment of Opinion Below ---------- 1

Statutes Involved ---------- 1

Respondents' Misconception of Questions Presented -- 2

Respondents' Statement of the Case ---------- 2

I. Respondents' Argument, That "Under Established General Principles, Petitioners Have No Standing to Sue", (Resp. Br. 9-12), Is Inapposite ---------- 5

II. Respondents' Arguments, That "Special Claims to Standing Are Without Merit," Are Severally Without Substance ---------- 6

A. Conspiracy (Resp. Br. 12-15) ---------- 6

1. Allegation of Conspiracy ---------- 6

2. Alleged waiver or abandonment of charge of conspiracy ---------- 8

B. Respondents' Argument Entitled "Special Statutory Interest" (Resp. Br. 15-18) ------ 10

C. Respondents' Argument Entitled "The Administrative Procedure Act" (Resp. Br. 18-21) 12

D. Respondents' Argument Entitled "Nonexclusive Franchises" (Resp. Br. 21-2) ---------- 16

III. Great Public Importance of Questions Presented and of Their Prompt Settlement---- 17

Conclusion ---------- 18

Appendices:

A. Section 2(f) of the Administrative Procedure Act ---------- 19

B. Order of the United States Court of Appeals for the District of Columbia Circuit, Dated September 23, 1955, Further Amending Its Opinion Dated April 28, 1955 ---------- 20

TABLE OF AUTHORITIES.

Cases.

A. E. Staley Mfg. Co. v. Secretary of Agriculture (C. C. A. 7), 120 F. 2d 258 13

Alabama Power Co. v. Ickes, 302 U. S. 464 5

Allis Chalmers Co. v. Union, 150 Fed. 155 8

Alton RR. Co. v. United States, 315 U. S. 15 13

B. F. Goodrich Co. v. Federal Trade Comm. (App. D. C.), 208 F. 2d 829 13

Bach v. Friden Calculating Machine Co. (C. C. A. 6), 155 F. 2d 361 3

Buchanan v. Warley, 245 U. S. 60 13

Cates v. Haderlein, 342 U. S. 804, reversing 189 F. 2d 369 (C. C. A. 7) 14

Claiborne-Annapolis Ferry Co. v. United States, 285 U. S. 382 13

Columbia Broadcasting System v. United States, 316 U. S. 407 13

Davis v. Aetna Acceptance Co., 293 U. S. 328 3

Doremus v. Board of Education, 342 U. S. 429 11

FCC v. Sanders Radio Station, 309 U. S. 470 ..... 13, 15

Fireproofing Co. v. Masons Ass'n. (C. C. A. 2), 169 Fed. 259 8

Heikkila v. Barber, 345 U. S. 229 15

Hotch v. United States (C. C. A. 9), 212 F. 2d 280 15

J. S. Tyree, Chemist, Inc. v. Thymo Borine Laboratory (C. C. A. 7), 151 F. 2d 621 3

Kristensen v. McGrath, 86 App. D. C. 48, 179 F. 2d 796, aff'd. 340 U. S. 162 15

Kuhn v. Princess Lida (C. C. A. 3), 119 F. 2d 704 ... 3

Land-O-Lakes Creameries v. McNutt (C. C. A. 8), 132 F. 2d 653 ... 13

Massachusetts v. Mellon, 262 U. S. 447 ... 11

Motley Green & Co. v. Detroit Steel & Springs Co., 161 Fed. 389 ... 8

National Coal Ass'n. v. F. P. C. (App. D. C.), 191 F. 2d 462 ... 13

Pacific Portland Cement Co. v. Food, etc. Corp. (C. C. A. 9), 178 F. 2d 541 ... 3

Pierce v. Society of Sisters, 268 U. S. 510 ... 13

Shaughnessy v. Pedieiro, 349 U. S. 48 ... 15

Standard Oil Development Co. v. Marzall, 86 App. D. C. 210, 181 F. 2d 280 ... 3

State v. Huegin (Wis.), 85 N. W. 1046 ... 8

Stearns v. Lumber Co. (Mass.), 157 N. E. 82 ... 8

TEP Co. v. TVA, 306 U. S. 118 ... 5, 17

Truax v. Corrigan, 257 U. S. 312 ... 6

Truax v. Raich, 239 U. S. 33 ... 13

United States v. Carusi (C. C. A. 3), 166 F. 2d 457 ... 15

Statutes.

Administrative Procedure Act (5 U. S. C. 1001-11) ... 12, 13, 16

Sec. 2(f) (5 U. S. C. 1001(f)) ... 2, 14, 19

Sec. 2(g) (5 U. S. C. 1001(g)) ... 1, 14

Sec. 10(a) (5 U. S. C. 1009(a)) ... 15, 16

Rural Electrification Act of 1936, as amended (7 U. S. C. 901-14) ... 3, 10, 15

Flood Control Act of 1944, as amended, Sec. 5 (16 U. S. C. 825s) ---------- 3, 10, 15

Congressional Report.

Senate Document No. 248, 79th Congress, 2d Session ---------- 1, 12, 14

No. 370.

In the Supreme Court of the United States

OCTOBER TERM, 1955.

KANSAS CITY POWER & LIGHT COMPANY, *et al.*,

Petitioners,

vs.

DOUGLAS McKAY, Secretary of the Interior, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

Amendment of Opinion Below.

On September 23, 1955 the court below (Prettyman, J. not participating) entered an order further amending the majority opinion entered herein on April 28, 1955. A certified supplemental transcript of record containing a copy of said order is filed herewith and said amendment is printed in Appendix B hereto, *infra*, 20.

Statutes Involved.

If, as Respondents seemingly assert (Resp. Br. 19-20, 28), Section 2(g) of the APA* (5 U. S. C. 1001(g)) is

* In addition to the abbreviations used in the Petition (Pet. 2 fn.) the following abbreviations are also used in this brief:

Petition for writ of certiorari ---------- Pet.
Respondents' brief in opposition ---------- Resp. Br.
Senate Document No. 248, 79th Congress, 2d Session ---------- Sen. Doc. No. 248

one of the statutes here involved, then Section 2(f) of that Act (5 U. S. C. 1001(f)) is also involved. It is printed in Appendix A hereto, *infra*, 19.

Respondents' Misconception of Questions Presented.

Respondents seek to eliminate from the "Questions Presented" three of the four separate and independent grounds of Petitioners' right to be heard, each of which was passed on by the court below. (Resp. Br. 2, Pet. 2-3, Pet. App. B, 46-58.) Moreover, as hereinafter shown, Respondents' grossly incomplete statement of the "Questions Presented" is predicated upon factual assumptions which misconstrue or misstate the nature and scope of Petitioners' separate claims and the purpose of the action.

Respondents' Statement of the Case.

The gist of the separate claims alleged in the Complaint is summarized at pages 8-12 of the Petition; and Respondents do not point out any aspects in which they contend that that summary is inaccurate or omits any allegation of fact which is legally significant for the purpose of the pending Petition.

Respondents do not, and cannot, deny that the decision of the court below is based wholly upon the allegations of the Complaint. Nevertheless, Respondents' "Statement" consists almost wholly of factual assertions allegedly supported by record citations to findings and evidence in the district court. Among the numerous record citations contained in the text of Respondents' Statement only two (Resp. Br. 6) are to the Complaint. For the purpose of the pending Petition, it is neither necessary nor appropriate to point out the extent to which Respondents' factual assertions, allegedly supported by findings and evidence, are erroneous or so incomplete as to be grossly misleading.

However, see "Salient Facts Established by the Findings and Evidence." (Pet. 12-17.)*

The gist of the separate claims stated in the Complaint is that Respondents, the Super Co-ops and other persons unknown to Petitioners have entered into, and are threatening to carry out, a conspiracy, the necessary, intended and expressly required effect of which is to destroy Petitioners' respective businesses in large areas of their service territories. Among the means being utilized by the conspirators to carry out their conspiracy are misuse of federal funds and the making of systems of integrated and reciprocally conditioned contracts under color, but in violation, of the RE and Flood Control Acts. (Pet. 8-12.) The purpose of the action is to prevent the conspirators from carrying out their conspiracy.

The claims are not founded on, and the action is not brought for the purpose of enjoining, the systems of contracts, the unlawful expenditure of federal funds or the violations of the statutes by Respondents. Respondents' misuse of federal funds, violations of statutory and constitutional limitations upon their authority and execution

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* At the request of Defendants-Respondents, the district court adopted as findings of fact various general conclusions which are squarely contradicted and nullified by that court's findings of basic facts. *Davis v. Aetna Acceptance Co.*, 293 U. S. 328, 332; *Kuhn v. Princess Lida* (C. C. A. 3), 119 F. 2d 704, 705-6; *Pacific Portland Cement Co. v. Food, etc. Corp.* (C. C. A. 9), 178 F. 2d 541, 548; *Bach v. Friden Calculating Machine Co.* (C. C. A. 6), 155 F. 2d 361, 364; *J. S. Tyree, Chemist, Inc. v. Thymo Borine Laboratory* (C. C. A. 7), 151 F. 2d 621, 624; *Standard Oil Development Co. v. Marzall*, 86 App. D. C. 210, 181 F. 2d 280, 284. Illustratively, compare finding 23 (R. 163) with findings 12-13 (R. 158-9). Many of such conclusory findings are also either pure conclusions of law or rest upon errors of law. Others are contrary to the uncontradicted evidence. Many of Respondents' factual assertions are not supported by their record citations or are supported only by citations to the foregoing erroneous conclusory findings as will be fully shown if the Petition is granted.

of the systems of contracts are material only because they are among the unlawful means being utilized to carry out the conspiracy. The fact, that an incidental result of preventing the conspirators from carrying out their conspiracy will be to prevent Respondents' misuse of federal funds and to invalidate such systems of contracts, does not change the gravamen of the claims or convert the action into one to restrain the misuse of federal funds or to invalidate such systems of contracts.*

Nevertheless, Respondents seek to reduce (1) the case to a bare claim that Petitioners, as owners of nonexclusive franchises, will fortuitously suffer a "loss of business" and (2) the purpose of the action to preventing (a) REA from lending federal funds to Super Co-ops for constructing electric facilities and (b) SPA from using federal funds to purchase power and to lease transmission facilities. Respondents' assertions that the Complaint does not allege "a conspiracy to injure Petitioners" but merely a conspiracy of Respondents "to exceed their statutory author-

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* Respondents cryptically state that Petitioners' motion for preliminary injunction was never brought on for hearing. (Resp. Br. 5, fn. 2.) When said motion was filed, Respondents requested additional time for preparing and filing opposing papers; and Petitioners consented upon condition that said motion be set for early hearing on a day certain. Shortly prior to the date set for hearing on said motion, Respondents filed a motion for summary judgment supported by a voluminous brief and voluminous affidavits. Over Petitioners' objections, the court ordered that Respondents' motion for summary judgment be heard and determined in advance of Petitioners' motion for a temporary injunction. Thereupon, Petitioners, to avoid further delay, moved for discovery and to advance the case for trial and suggested that, to expedite the litigation, the case be specially assigned to one of the Judges in the district court in order to permit the case to be heard and determined before the Summer recess. The case was specially assigned but motions and pretrial proceedings and other commitments of the Judge prevented its trial before the Summer recess.

ity" and that, in any event, Petitioners abandoned the charge of conspiracy (Resp. Br. 6, 7, 13), are refuted *infra*, 6-10.

I. RESPONDENTS' ARGUMENT, THAT "UNDER ESTABLISHED GENERAL PRINCIPLES, PETITIONERS HAVE NO STANDING TO SUE," (Resp. Br. 9-12), IS INAPPOSITE.

Respondents curiously designate the four separate and independent grounds, upon which Petitioners throughout this litigation have claimed the right to be heard (Pet. 2-3), as "Special Claims to Standing." (Resp. Br. 12-22.) For some unexplained reason Respondents, before discussing such "Special Claims to Standing," purport to demonstrate that, if none of the grounds relied upon by Petitioners were involved, Petitioners would have no right to be heard. (Resp. Br. 9-12.) Respondents assert in substance that, upon this hypothetical assumption, Petitioners' right to be heard would be foreclosed by *Alabama Power Co. v. Ickes*, 302 U. S. 464 and *TEP Co. v. TVA*, 306 U. S. 118. In those cases the APA was not involved; the charges of conspiracy were dismissed solely for failure of proof; the complainants did not claim any statutory right or interest; and the pertinent States had specifically authorized TVA to engage in the electric utility business.

Petitioners have demonstrated that the foregoing decisions do not foreclose Petitioners' right to be heard upon any of the four separate grounds asserted by Petitioners but that, in so far as apposite, those cases support Petitioners' claims. (Pet. 23-5, 29-30.) Respondents do not answer, but instead ignore, that demonstration. Although this branch of Respondents' argument seems footless, it is significant, and typical of Respondents' brief, that the "REA loans" and the "SPA contracts" are discussed as though they were independent and unrelated transactions,

whereas they are indivisible and inseparable parts of a single scheme and none is effective unless all are effective and until each Super Co-op has obtained from all of its member distribution cooperatives, contracts binding them to cease patronizing Petitioners and to purchase their entire requirements from SPA for a period of 40 years. (Pet. 8-12; see also 12-17.)

II. RESPONDENTS' ARGUMENTS, THAT "SPECIAL CLAIMS TO STANDING ARE WITHOUT MERIT," ARE SEVERALLY WITHOUT SUBSTANCE.

A. Conspiracy. (Resp. Br. 12-15.)

1. *Allegation of Conspiracy*: For the first time in this litigation Respondents assert that the Complaint does not allege a conspiracy "calculated to destroy their (Petitioners') business," but only "a conspiracy to exceed statutory authority." (Resp. Br. 13, 6.)

> "Concert of action is a conspiracy if its object is unlawful *or* if the means used are unlawful." *Truax v. Corrigan*, 257 U. S. 312, 327.

The Complaint specifically alleges that the defendants and divers persons unknown to plaintiffs had conspired and acted in concert to formulate an unlawful plan (R. 35); that defendants and three named Super Co-ops (N. W.; Central; and Sho-Me), acting collectively and in concert, were engaging, or threatening to engage, in numerous overt acts in furtherance of the conspiracy (R. 37, 42); that, upon information and belief, defendants and additional Super Co-ops then unknown to plaintiffs were engaging, or threatening to engage, in similar overt acts in furtherance of the conspiracy (R. 48); and that the means being utilized to carry out the conspiracy are severally unlawful (R. 50). To contend that such allegations do not

sufficiently charge a conspiracy among Respondents-Defendants and the Super Co-ops is plainly untenable.*

While the Complaint alleges other elements of damage to Petitioners, it specifically alleges that one purpose and effect of the conspiracy is to require all of the distribution cooperatives, which are members of the Super Co-ops, to cease patronizing Plaintiffs and to purchase all of their electric requirements from SPA (R. 40, 46). The plain purpose and effect of the conspiracy is to destroy Petitioners' respective businesses in large areas of their service territories.** However, if the Complaint had alleged only that the purpose and effect of the conspiracy is to damage Petitioners (whether by competition or otherwise), it would state a claim upon which Petitioners have a right to be heard under the very cases upon which Respondents rely. (Pet. 24-5.)

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* As stated by Judge Prettyman in his dissenting opinion:

"While the complaint alleges the contemplated sets of contracts to be illegal in a number of respects, we need now notice only one. A principal thrust of the complaint is against concerted action, formalized by written agreement, of the Government officers and the Super Co-ops. The allegation is that a number of persons—suppliers and customers—confederated to deprive plaintiffs of their business by entering into agreements whereby all the customers of plaintiffs would transfer their patronage to a potential competitor. Technically in legal terms, such an agreement and concert of action is a conspiracy." (Pet. App. B, 61.)

** In his dissenting opinion Judge Prettyman also said:

"I think our plaintiffs show a case which gives them standing to sue. They allege not only that their business would be impaired by these contracts but that it would be wholly taken. * * *

"The court treats the contracts as merely setting up competition for the Companies. I do not see them that way. Allegedly these contracts would take all this business away from the Companies and give it to the Government. This would be a complete destruction by concerted action, not a mere establishment of competition. * * *" (Pet. App. B, 63-4.)

Respondents' alleged distinction between a conspiracy to injure Petitioners and a conspiracy to exceed statutory authority, is obscure and unexplained. (Resp. Br. 6, 13.) Seemingly the theory is that, although a third person will necessarily and knowingly be damaged by a concert of action, the concerted action is not a conspiracy unless the purpose, or a primary purpose, of the conspirators is to injure the third party. Where, as here, the means used are unlawful (and, were that material, the object is also unlawful), malice is not an essential element of conspiracy. Moreover, in the law of conspiracy malice does not consist of actual ill will but of lack of legal justification for inflicting the damage upon a third party; and the damage threatened to Petitioners is the inevitable, intended and known result of carrying out the conspiracy. *Stearns v. Lumber Co.*, (Mass.) 157 N. E. 82; *Fireproofing Co. v. Masons Ass'n.*, (C. C. A. 2) 169 Fed. 259; *Allis Chalmers Co. v. Union*, 150 Fed. 155, 172-3; *State v. Huegin* (Wis.), 85 N. W. 1046; *Motley Green & Co. v. Detroit Steel & Springs Co.*, 161 Fed. 389.

2. *Alleged waiver or abandonment of charge of conspiracy*: Although no such claim was made in the court below and its decision is based wholly on the Complaint, Respondents now contend that Petitioners have waived any right to rely upon the conspiracy alleged in the Complaint (Resp. Br. 14, 7). In the district court different judges overruled successive motions to dismiss the Complaint and for summary judgment upon the ground, among others, that Petitioners have no right to be heard. (R. 104-7, 109.) Thereafter, on Respondents' request and over Petitioners' objections, the district court ordered a separate trial on an issue designated as "the legality or illegality of said contracts" and further narrowed that issue in

its pretrial order. (R. 112, 121-5.) Manifestly, as Respondents concede (Resp. Br. 14), the limitations imposed by the district court upon the scope of the separate trial precluded the making or requesting of any finding as to conspiracy; and no finding upon that point was requested either by Respondents or Petitioners.

Since the district court had twice sustained Petitioners' right to be heard and the findings made and the evidence received on the separate trial clearly establishes the conspiracy alleged in the Complaint as a matter of law*, there was no need or occasion to request a further hearing upon, or to introduce further cumulative evidence in support of, Petitioners' right to be heard or the allegations of conspiracy. Petitioners were anxious to expedite final disposition of the case in the district court, which had been greatly delayed by the separate trial ordered over Petitioners' objections. However, Respondents refused to stipulate facts necessary to prove jurisdictional amount (without which final judgment could not be entered) unless Petitioners would file a motion for the entry of final judgment in the form entered by the court. (R. 193.) To avoid further delay Petitioners acceded to this demand. As appears on the face of this curious judgment, the district court had previously determined "the issues of jurisdictional amount, *standing to sue*, and the legality of the contracts" (R. 193); and Petitioners waived

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* At the hearing on the respective motions of Petitioners and Respondents for discovery, Respondents successfully argued that no further discovery should be permitted on the issue of conspiracy because the concerted action of Respondents and the Super Co-ops was fully shown by the systems of contracts theretofore produced. Manifestly, Petitioners have a right to support the decisions of the district court, that Petitioners have a right to be heard, upon any relevant ground, whether or not relied upon by that court.

only any right "to present additional evidence on any other issue." This contention of Respondents is plainly without substance.

B. Respondents' Argument Entitled "Special Statutory Interest." (Resp. Br. 15-18.)

As shown in the Petition, both the language and legislative history of the RE and Flood Contract Acts establish that many of the limitations imposed upon the authority granted to their Administrators, which Respondents are violating, were imposed by the Congress to protect privately owned utilities against special damage which would be caused by the prohibited acts; and under the decisions therein cited such statutes create a legally protectable interest in Petitioners. (Pet. 25-9.) Respondents do not challenge the accuracy of the review of the statutory language and legislative history of those Acts contained in the Petition or attempt to distinguish the decisions therein cited.

Instead, Respondents argue that the statutes should not be construed as conferring any statutory interest upon Petitioners because the statutes do not (1) confer such an interest in express terms or (2) directly and affirmatively regulate or impose restraints upon the manner in which Petitioners conduct their business or (3) specifically provide for hearing and judicial review. (Resp. Br. 15-6.) These arguments are plainly without substance, unsupported by any citation of authority and contrary to the decisions cited in the Petition (Pet. 28-9), to the cases cited *infra* 13, and to the Congressional declaration quoted *infra* 13-14. Manifestly, limitations upon grants of statutory authority do not automatically create a special statutory interest in any one and every one; but, where,

as here, the language and legislative history of statutes show that limitations imposed upon authority thereby granted were intended to protect particular classes, it is equally clear, under established principles, that such statutes do create a special statutory interest in such classes. (Pet. 25-9.)

Contrary to Respondents' assertion, Petitioners do not predicate standing in this aspect upon mere allegations that they are taxpayers and citizens and that Respondents have exceeded their statutory authority (Resp. Br. 17); and Respondents' argument *in terrorem* that acceptance of Petitioners' construction of these statutes would establish a right in any taxpayer or citizen to test the validity of any governmental action is a complete *non sequitur*. However, it may be noted that in *Massachusetts v. Mellon*, 262 U. S. 447, this Court did not hold that the taxpayer (Frothingham) had no right to maintain the action for lack of any legal interest but, instead, because the interest of a federal taxpayer in the moneys of the Treasury is so minute and indeterminable and so remote, fluctuating and uncertain, that it affords no basis for an appeal to the preventive power of a court of equity. (1. c. 487.) See *Doremus v. Board of Education*, 342 U. S. 429 at 434.

Respondents finally argue that, to the extent that the statutes set forth the circumstances in which their adminisrators may act, "they merely provide 'guideposts' " for administrative action. (Resp. Br. 17-8.) If this contention has any meaning, it is that where a congressional grant of administrative authority is conditioned upon the existence of prescribed facts and limited to a prescribed purpose, such contentions and limitations are merely "guideposts" which the administrative agent may disregard in his discretion. If that is the law, then administra-

tive agencies of the Congress are indeed a privileged class; and, contrary to the declaration of the Congress, the statutes "would in effect be blank checks drawn to the credit of some administrative officer or board." (Sen. Doc. No. 248 at 212, 275, quoted Pet. 19 footnote.) This argument is further refuted by other Congressional declarations.*

C. Respondents' Argument Entitled "The Administrative Procedure Act." (Resp. Br. 18-21.)

Contrary to Respondents' seeming assertion (Resp. Br. 18-19), the fact that the majority of the court below, after basing its decision of this point upon the erroneous reasoning stated in the Petition (Pet. 18), stated that it was not unmindful of (although it did not apply) the principles declared by this Court (Pet. App. B, 55-6), in no way cures its erroneous construction of the Act. Respondents make no attempt to reconcile the decision with the language and legislative history of the Act or with the applicable principles declared by this Court. (See Pet. 18-23.)

Respondents argue that Petitioners are not adversely affected or aggrieved because the agency action does not directly regulate, or impose an obligation or sanction upon, or deny relief to, or fix the status of, Petitioners. (Resp. Br. 19, 21, 16.) The agency action expressly requires the distribution cooperatives, which are members of the Super Co-ops, to cease patronizing Petitioners and to buy their

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* "The statutes of Congress are not merely advisory when they relate to administrative agencies, any more, than in other cases." Sen. Doc. No. 248 at 275.

"There have been much misunderstanding and confusion of terms respecting the discretion of agencies. * * * They may not take affirmative or negative action without the factual basis required by the laws under which they are proceeding." Sen. Doc. No. 248 at 368-9.

entire electric requirements from SPA for a period of 40 years and thereby threatens destruction of Petitioners' businesses in large areas of their service territories. Respondents' argument is squarely refuted by numerous decisions of this Court. E.g., *Columbia Broadcasting System v. United States*, 316 U. S. 407, 422-3; *Pierce v. Society of Sisters*, 268 U. S. 510, 535; *Truax v. Raich*, 239 U. S. 33, 38-9; *Buchanan v. Warley*, 245 U. S. 60, 73; *Claiborne-Annapolis Ferry Co. v. United States*, 285 U. S. 382, 390; *Alton RR. Co. v. United States*, 315 U. S. 15, 18-20; *FCC v. Sanders Radio Station*, 309 U. S. 470, 476, 477. It is also refuted by numerous decisions of federal courts of appeals. *A. E. Staley Mfg. Co. v. Secretary of Agriculture* (C. C. A. 7), 120 F. 2d 258, 259-60; *Land-O-Lakes Creameries v. McNutt* (C. C. A. 8), 132 F. 2d 653, 657-8; *B. F. Goodrich Co. v. Federal Trade Comm.* (App. D. C.), 208 F. 2d 829, 833-4; *National Coal Ass'n. v. F. P. C.* (App. D. C.), 191 F. 2d 462, 465-6.

Although asserting that the court did not hold that the right to judicial review under the APA depends upon an express grant of such a right (Resp. Br. 18-9), Respondents argue that "it is decisive that the statutes involved do not in terms" create any substantive rights, or right of judicial review or require "conventional" administrative hearings. (Resp. Br. 20.) The fact that the statutes do not in express terms create a legal interest is immaterial. (Pet. 28.) The Congress has explicitly declared that the absence of an express provision for judicial review is completely immaterial. (Pet. 19 fn.)

The Congress has also declared:

> "Where there is no statutory administrative hearing to which review is confined, the facts pertinent to any relevant question of law must, of course, be

tried and determined *de novo* by the reviewing court." (Sen. Doc. No. 248 at 370.)

See *Cates v. Haderlein*, 342 U. S. 804 reversing 189 F. 2d 369 (C. C. A. 7).

Respondents profess doubt as to whether (1) the administrative action here involved constitutes "agency action" or (2) if "agency action," it is not committed to agency discretion and therefore exempt from judicial review. (Resp. Br. 19, 20.) If the construction of the Act in these respects is doubtful, then those doubts should be settled by this Court.

However, Section 2(g) defines "agency action" to include, among other things, every agency "sanction, relief, or the equivalent or denial thereof." (Resp. Br., App. A 28.) Section 2(f) defines "sanction" to include every "requirement, limitation or other condition affecting the freedom of any person" and "destruction * * * of property" and defines "relief" to include "any agency grant of money, assistance, * * * privilege, or remedy" and the "taking of any other action upon the application or petition of, and beneficial to, any person." (App. A, *infra* 19.) The Congress expressly declared that the foregoing terms were "meant to be all embracing" and that the definition of the term "agency action" brings together and includes terms theretofore defined in order to simplify the judicial review provisions of Section 10 and to "assure the complete coverage of every form of agency power, proceeding, action, or inaction." Sen. Doc. No. 248 at 198, 255, 356. Clearly, the agency action here involved constitutes both "sanction" and "relief." *Supra* 3, 6, 7, 12-13.

Respondents further argue that the necessity for the administrators of the RE and Flood Control Acts to obtain annual appropriations from the Congress in some way pre-

cludes judicial review. With few, if any, exceptions, every administrative agency must obtain annual appropriations to defray the cost of performing its functions; and if that circumstance precluded judicial review, then the years of labor devoted by the Congress to framing and adopting the APA were wasted.*

The cryptic assertion in the majority opinion and in Respondents' brief, that Petitioners are not "adversely affected or aggrieved * * * *within the meaning of any relevant statute,*" is neither explained nor substantiated. (Resp. Br. 21, Pet. App. B 54.) While the meaning of the term "any relevant statute" in Section 10(a) is undoubtedly broader, it clearly includes any statute under which challenged agency action is taken. Pet. 22; *Heikkila v. Barber*, 345 U. S. 229; *Shaughnessy v. Pedreiro*, 349 U. S. 48; *United States v. Carusi* (C. C. A. 3), 166 F. 2d 457, 460; *Kristensen v. McGrath*, 86 App. D. C. 48, 179 F. 2d 796, 799, 800, aff'd. 340 U. S. 162. That Petitioners are threatened with direct and special damage by the agency action taken under the RE and Flood Control Acts, cannot be denied and is conceded. Inescapably, Petitioners are adversely affected within the principle laid down by this Court in *FCC v. Sanders Radio Station*, 309 U. S. 470, 476-7 and similar cases. (Pet. 20.)

An assumption, that this cryptic assertion is predicated upon the majority's conclusions that the RE and Flood Control Acts create no substantive statutory interest in Petitioners, that Petitioners have no right to be heard upon the charge of conspiracy in the Complaint and that Petitioners have no standing to protect their property

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* As stated in *Hotch v. United States* (C. C. A. 9), 212 F. 2d 280, the APA "must be read as a part of every delegation of authority unless specifically excepted." (l. c. 283.)

rights in nonexclusive franchises against invasion by defendants *acting as private individuals* and not in their official capacity, would not support the assertion even if such conclusions were not severally erroneous. Under each of the three foregoing independent grounds of Petitioners' right to be heard, Petitioners assert a substantive right which they can protect independently of the APA. However, where, as in the APA, the Congress has authorized persons adversely affected by agency action to invoke a judicial review, their right so to do is not dependent upon their possession of a substantive legal right; and it is sufficient if the agency action is causing or threatening to cause direct and special damage to them. (Pet. 20-1.)

The argument that Petitioners are not sustaining legal wrong within the meaning of Section 10(a), rests not only upon the Court's erroneous decision of the three independent grounds of Petitioners' right to be heard, but also upon a misinterpretation of the term "legal wrong" as used in the Act. Legislative history shows that the term "legal wrong," as used in the Act, has a broader scope than the term "*injuria*" under prior judicial decisions. (Pet. 21.)

D. Respondents' Argument Entitled "Nonexclusive Franchises." (Resp. Br. 21-2.)

Respondents again attempt to segregate the REA and SPA contracts and treat them as though they were wholly unrelated to each other and to the contracts requiring the distribution cooperatives to cease patronizing Petitioners and to purchase their entire requirements from SPA. In this argument Respondents assume that the activities of REA are limited to the lending of money although the assumption is contrary to the explicit allegations of the

Complaint and to the facts established by the findings and evidence. (Pet. 8-17.)

Respondents quote a statement from the opinion in *TEP Co. v. TVA*, 306 U. S. 118, to the effect that the privately owned utilities had "no vested right" to the maintenance of a State policy requiring a nonexclusive franchise for engaging in the electric utility business. In that case the States involved had, by statute, expressly authorized TVA to engage in the electric utility business without obtaining a nonexclusive franchise (Pet. 30); and the quoted language merely means that, since the exemption of TVA from such a requirement did not involve an unreasonable classification under the Fourteenth Amendment, the utilities could not complain. Missouri and Kansas have not exempted SPA from the statutory policy of those States; and the quoted language is wholly inapplicable to the case at bar.

III. GREAT PUBLIC IMPORTANCE OF QUESTIONS PRESENTED AND OF THEIR PROMPT SETTLEMENT.

Petitioners have shown the great public importance of the questions presented and of their prompt settlement by this Court. (Pet. 31-2.) Nowhere in their brief do Respondents question or challenge Petitioners' showing in either respect.

CONCLUSION.

For the reasons stated in the Petition for a writ of certiorari and in this brief, the Petition should be granted.

Respectfully submitted,

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October 12, 1955.

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* Names of counsel appearing specially for particular Petitioners are listed inside of cover page.

APPENDIX A.

SECTION 2(f) OF THE ADMINISTRATIVE PROCEDURE ACT:

"Sanction and relief.

"(f) 'Sanction' includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirement, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. 'Relief' includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (2) recognition of any claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person." Act of June 11, 1946, c. 324, § 2(f), 60 Stat. 237; U. S. C. A., Title 5, § 1001(f).

APPENDIX B.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, DATED SEPTEMBER 23, 1955, FURTHER AMENDING ITS OPINION DATED APRIL 28, 1955.

Before: Prettyman, Bazelon and Washington, Circuit Judges, in Chambers.

ORDER.

It is ORDERED by the Court that the opinion of this Court entered herein April 28, 1955, be, and it is hereby, amended by adding the following after the sentence ending in the second line of Page 15: *

> "Plaintiffs-appellants cite and rely on the view expressed in *American President Lines v. Federal Maritime Board*, 112 F. Supp. 346, at 349 (D. C. D. C. 1953), which would in effect delete from Section 10(a) the phrase 'within the meaning of any relevant statute.' That view cannot, of course, be accepted."

and by adding to footnote 18 on Page 17** the following: Friend v. Lee, ____ U. S. App. D. C. ____, 221 F. 2d 96 (1955), so that said footnote as amended will read as follows:

> "Embassy Dairy v. Camalier, 93 U. S. App. D. C. 364, 211 F. 2d 41 (1954); Friend v. Lee, ____ U. S. App. D. C. ____, 221 F. 2d 96 (1955)."

Per Curiam.

Dated: September 23, 1955

Circuit Judge Prettyman did not participate in the foregoing order.

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* Page references in the above order are to the official slip opinion print. (R. 653-77.) The above reference is to the last sentence appearing on page 54 of Appendix B to the Petition for Certiorari.

** Footnote 18 (R. 669) appears on page 57 of Appendix B to the Petition for Certiorari.